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Dissent and Disestablishment: The Church-State Settlement in the Early American Republic

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I. INTRODUCTION

Religious belief—its content and sincerity—is an individual affair. Each person is his own moral actor. But religion is rarely just an individual affair. It comes in many assorted groupings: clusters of people bound together by collective worship and ritual, sacred literature and creed, clerical leaders and governing polity, shared history and beloved buildings, overseas mission fields and neighborhood social projects. We call these various clusters of communal activities churches, synagogues, mosques, mission societies, hospitals, faith-based charities, parochial schools, and church-related colleges. These (and others) are all embraced, if inadequately, by the term "religious organizations."

The modern public law of religious freedom tries to take this organizational messiness into account and mostly succeeds. At least this is so in the West where not one, but two relationships have long been detailed juridically to account for it all. First, and primary, is the relationship between the nation-state and those individuals within its borders, the aforementioned moral actors, be they conformists or dissenters, believers or nonadherents. Second, and more complex, is the relationship between the nation-state and organized religion, or simply church-state relations. This latter relationship builds on the dual-authority pattern characteristic of Western society.[1] The pattern recognizes coexisting sovereigns: civil government, which concerns itself with the secular; and church, which deals with the sacred. These two structures have spheres of interest that partly overlap, of course, and "sacred" does not mean that religious organizations are merely (or even mostly) focused on the hereafter, for they are highly visible institutions drawing considerable public attention and occupying real ground in the here and now.

In its opinions dating from the 1940s, the United States Supreme Court has resolved those questions having to do with the first relationship, that between the civil state and individual believers, under the Free Exercise Clause. And, likely sensing the dual-authority pattern of church and state familiar in the West, it has sorted out the exceedingly more fractious questions that implicate the second relationship, namely that between government and organized religion, under the Establishment Clause. The Court has not in so many words said that this is what it is doing, but that is what it has been doing.[2] Whether this tidy consignment of legal questions to either one or the other of the two Religion Clauses (or some other meaning) reflects what was originally intended by the authors of the First Amendment still generates a hefty monograph at a rate of about one every other year. This paper does not take up the originalist question. Rather, the aim here is to examine the bedrock upon which the work of the modern Court is built. From this perspective, the dual-relationship construct nicely resolves a series of otherwise nasty conundrums in the modern Court's religious

1. JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY 1–10 (3d ed. 2003).

2. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

freedom jurisprudence.[3] Developed elsewhere is a list of those doctrinal puzzles,[4] each of which is solvable if the Free Exercise Clause is regarded as a right vesting in each individual the ability to resist many government-imposed burdens on his religion, and the Establishment Clause is regarded as a power-limiting clause, a "negative" on the legislative, executive, and judicial authority of the state.[5]

Avoiding treatment of the Establishment Clause as an individual right to be free from religion is key. Failure to avoid treating the Clause as such a right leads to confusion.[6] That is, to regard free

3. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445 (2002).

4. *Id.* at 456–71 (arguing that a conception of the Establishment Clause not as an individual right but as a power-limiting clause explains the following: why a claim under the Establishment Clause is alone in being properly invoked by claimants with taxpayer standing; why a violation of the Establishment Clause can result in a remedy for nonreligious harm; why a violation of the Establishment Clause can result in a remedy not only for the claimant but an entire class of people, some of whom even opposed the relief; why claims are dismissed for lack of subject matter jurisdiction referencing the Establishment Clause as denying the court jurisdiction; why there is one court-formulated definition of religion for the Free Exercise Clause and a different definition for the Establishment Clause; why courts sometimes reason that the Establishment Clause exists to protect religion from its own poor choices in its acceptance of certain aid from government; and why there need be no tension between the Establishment Clause, on the one hand, and the Free Exercise and Free Speech Clauses, on the other hand).

5. Justice Brennan, writing separately in *Marsh v. Chambers*, 463 U.S. 783 (1983), nicely contrasts the difference between an individual rights clause and the manner in which the Court employs the Establishment Clause to limit the power of government:

> Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land.

Id. at 802 (Brennan, J., dissenting). An equally revealing statement concerning the Court's structural view of the Establishment Clause appears in a separate opinion by Justice Frankfurter:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.

McGowan v. Maryland, 366 U.S. 420, 465–66 (1961) (Frankfurter, J., concurring).

6. Alexander Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROBS. 61, 71 (1949) ("[A]ll discussions of the First Amendment are tormented by the fact that the term 'freedom of religion' must be used to cover 'freedom of nonreligion'

exercise as a right held by A to practice his faith, and no-establishment as a second and different right vested in B to be free of unwanted exposure to A's religious exercise, makes no sense. It inevitably places these two clauses, lying side by side in the text of the First Amendment, on a collision course.[7] Attempts under such a treatment to reconcile the two rights, or to subordinate one to the other, are tortuous and unpersuasive. This supposed "collision" between the clauses falls away, however, when the Establishment Clause is regarded as an aspect of the Constitution's overall structure of limited government,[8] one policing the boundary between civil authorities and organized religion.[9] As so conceived, the clauses can still, on occasion, overlap in their cognizance, but when that occurs, the clauses merely reinforce each other; hence, there is no "collision" between the two.[10] This construct of the no-establishment principle

as well. Such a paradoxical usage cannot fail to cause serious difficulties, both theoretical and practical.").

7. Consider, for example, the line of equal-access cases involving public schools. A typical case arises when a student religious club seeks the same access to meeting space or channels of communication enjoyed by similar secular clubs. When access is denied, the students sue, claiming a denial of their rights under the Free Exercise Clause (religious discrimination) and Free Speech Clause (content or viewpoint discrimination). While the discriminatory nature of the policies can hardly be denied, school authorities insist that the disparate treatment is required by the Establishment Clause so as to preserve the nonreligious character of the schools for other students. The schools thus argue that a right to nonreligion must be balanced against the free exercise and free speech rights of students attending the religious club, with the balance (in the opinion of school officials) tipping in favor of secularity. With the issue so framed, the situation is inevitably one of analytical confusion. Fortunately the Court has held for the students in all cases, but its rationale has been rather muddled. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (plurality in part); Widmar v. Vincent, 454 U.S. 263 (1981).

8. Like all provisions of the Bill of Rights, the Establishment Clause operates only to limit the actions of government. In a speech before the House introducing his draft of the proposed amendment, James Madison described its purpose as follows: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 ANNALS OF CONGRESS 437 (Joseph Gales ed., Gales & Seaton 1789).

9. The no-establishment principle operates not unlike a separation of powers clause that keeps in proper relationship the coordinate branches of government. No-establishment keeps separate state and church, only here the principle does not limit two competing powers but restrains only the government. One should not be distressed by this one-way restraint. Should government act to promote religion as religion, under the Establishment Clause such actions are still restrained as beyond the power of the government. *See* Esbeck, *supra* note 2, at 10 n.35, 12 & n.44.

10. Both the Free Exercise Clause and the Establishment Clause limit or "negative" government power. Because it is impossible for two "negatives" on power to conflict, they

also helps to reduce the fractious nature of church-state litigation, certainly a desirable goal.[11]

This clever paradigm shift would have little staying power, however, if it did not fall in step with how the *polis*, past and present, worked out and continues to think about relations between church and state. The construct certainly resonates with the popular understanding of the Establishment Clause as regulating interactions between church and state. There is a government (national, state, or local) with its attending political philosophy, and there is a church (synagogue, mission society, denominational college, parochial school, or faith-based charity) with its attending ecclesiology. Each body in this relationship is understood to have a proper role and to occupy a certain sphere of responsibility. Each body, while important, comprises only a part of the overall society, not the whole of society or even most of the public aspects of modern society. Each body, state and church, has a legitimate claim, albeit of a different nature, on the allegiance of individuals, called "subjects" or "citizens" by the nation-state and "adherents" or "laity" by the

cannot be said to ever "collide." *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 324–25 (2000). Furthermore, even when the clauses overlap and thus reinforce one another, it does not mean that the clauses duplicate one another. To illustrate, assume a public school teacher begins each day by having a different student read a passage from the Bible. On the day in which a Muslim student is designated to read a passage, the student objects because of her faith. The teacher persists and threatens punishment. The daily exercise violates the Free Exercise Clause when imposed on students of non-Christian faith. Additionally, it violates the Establishment Clause to subject any student, of whatever faith or no faith, to the devotional exercise. While the clauses overlap, they are not in tension. *Id.* at 312–15, 323–24.

Note, moreover, how these two clauses operate very differently while achieving a similar result for the student. The Free Exercise Clause will provide the Muslim student with a court order permitting her to opt out of the Bible-reading exercise. The Establishment Clause, by way of contrast, will enjoin the exercise altogether, doing so whether the student is religious or nonreligious, even as to those students who want the daily classroom devotional. The judicial remedy is broader under the Establishment Clause because the clause's nature as a structural restraint prevents government from engaging in an inherently religious practice, a matter beyond the government's competence. *See* Esbeck, *supra* note 3, at 459–60.

11. There is a reason that Establishment Clause cases are more fractious. The Free Exercise Clause is about the religiously informed conscience of individuals, often involving small sects with practices out of step with the dominant culture. America has a large and wealthy civil society and can accommodate a goodly amount of countercultural behavior. The Establishment Clause, in contrast, is often portrayed as addressing "who's in charge"—that is, the world view (religious or nonreligious) that holds the mantle of cultural authority. Such culture wars are divisive. The cultural struggle diminishes considerably in constitutional litigation when the Establishment Clause, as urged in the text, is understood as a structural limit on the government, keeping it from inserting itself into the field of religion.

church. It necessarily follows that citizens who are also adherents will have two loyalties: God and country. In the West, although the two powers have chafed one another, both have readily acknowledged for centuries that they each occupy a distinct jurisdiction within the whole of society.

This pattern of dual authority was inchoate when Imperial Rome first legalized the Christian church in 313 AD with the Edict of Milan.[12] Emperor Constantine's directive to tolerate Christianity, which was soon followed by instances of official favoritism, eventually gave way to Emperor Theodosius I's edicts in 380–381[13] establishing the Christian church to the exclusion of all other religions. This transition period, however, was not without conflict between the two powers. For example, Hosius, Bishop of Cordova, wrote the Emperor Constantius around 350 about his conception of church and empire as follows:

> Do not interfere in matters ecclesiastical, nor give us orders on such questions, but learn about them from us. For into your hands God has put the kingdom; the affairs of his Church he has committed to us. If any man stole the Empire from you, he would be resisting the ordinance of God: in the same way you on your part should be afraid lest, in taking upon yourself the government of the Church, you incur the guilt of a grave offense. "Render unto Caesar the things that are Caesar's and unto God the things that are God's." We are not permitted to exercise an earthly rule; and you, Sire, are not authorized to burn incense.[14]

In 358 Constantius attempted to unite Christians in opposition to the Nicene Creed. His attempt drew this rebuff from Athanasius, the powerful Bishop of Alexandria and a supporter of the creed: "When did a judgement of the church receive its validity from the Emperor?"[15] The struggle over defining the scope of these two roles

12. JOHN T. NOONAN, JR. & EDWARD M. GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 39 (2001).

13. *Id*. at 40.

14. DOCUMENTS OF THE CHRISTIAN CHURCH 27 (Henry Bettenson ed., 2d ed. 1963).

15. A LION HANDBOOK: THE HISTORY OF CHRISTIANITY 144 (rev. ed. 1990) [hereinafter LION HANDBOOK]. Athanasius went on, albeit not entirely accurate as to his history, "There have been many councils held until the present and many judgements passed by the church; but the church leaders never sought the consent of the Emperor for them nor did the Emperor busy himself with the affairs of the church." *Id*. For more about the protracted dispute over the Nicene Creed, see *id*. at 143–51, 164–78.

did not end with the formal establishment of Christianity. Writing in 494 to the Byzantine Emperor Anastasius I, Pope Gelasius I explicitly laid out the dual-order relationship: "Two there are, august Emperor, by which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power."[16] However, Gelasius proceeded to argue for a version of the dual order where the office of pope was superior to that of the emperor.[17]

Things change, of course, constantly change. Western political theory and ecclesiology, existing side by side in the same time and space, competed, and their adherents brought to bear ideological and (at times) even military pressure on the other. As a result, the exact placement of the line between state and church has shifted over time, first in Europe and then in America. However, while the exact location of this line has remained contested, all agree that there is a line. Those who dispute the proper location of the boundary (including most readers of this paper) nonetheless presuppose the existence of the dual authorities, each with its sphere of proper jurisdiction and each with some jurisdiction held to the exclusion of the other.

This paper has two aims. They are more in the nature of history than law. The first aim is to show that since the fourth century Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other subject matter areas in which each is noncompetent to perform the tasks of the other. When the civil state overreaches and performs a task within the sole province of the church, or misguided officials attempt to delegate an exclusive state function to the church,[18] the boundary between church and state is transgressed. More particular to American public law since *Everson v. Board of Education*,[19] when a

16. John Courtney Murray, *The Freedom of Man in the Freedom of the Church*, *in* MODERN AGE 134, 137 (1957).

17. LION HANDBOOK, *supra* note 15, at 151, 200–01.

18. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (disallowing a city ordinance that delegated to churches the power to veto the city's issuance of nearby liquor licenses).

19. 330 U.S. 1 (1947). In *Everson*, the Supreme Court first incorporated the Establishment Clause, thus making it binding on state and local governments. This ushered in the modern era of the Court's religious freedom jurisprudence. The modern Court and *Everson* are discussed *infra* Part IV.

state government crosses this boundary, it has transgressed a negative on its authority, thus exceeding the power-limiting restraint that is the modern Establishment Clause.

The second aim of this paper is to uncover historical figures that advanced a proposition concerning religious freedom that became the American church-state settlement. The American settlement—perhaps it is only a predilection, as "settlement" suggests a consensus ratified at some formal level—is not one of civic republicanism in which church and state openly and materially support and mutually reinforce one another for the purpose of sustaining the republic. Nor is the American settlement one of a hermetic separation between church and state in which all things religious are kept at arm's length from government, its lawmaking, and other public affairs.[20] Rather, the American theory of religious freedom emerged out of the juridical disestablishment occurring at the beginning of the American Revolution and continuing on through the early republic (1774–1833).

Disestablishment was not an abrupt legal development advanced at the national level as a consequence of the Revolution. Nor was it the work of the First Amendment, which bound only the lawmaking authority of the new federal government.[21] Rather, disestablishment unfolded more gradually, state by state, and somewhat differently in each state, depending on the state's unique colonial background. In its simplest formulation, the American solution to the church-state problem was to deny to the civil government its prior authority over inherently religious questions, thus leaving such matters within the sole province of the church. Henceforth, politics did not depend on a shared theology. What was crucial in carrying out this reduction in governmental authority were the changes in thought—both American religious thought about the role of government and American social thought about the nature of religion—which soaked

20. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 19–107 (2002). Hamburger causes one to be cautious when using the phrase "separation of church and state." This phrase is not synonymous with disestablishment. *See id.* at 3–16. When separation of church and state is taken to mean a socially or juridically enforced separation of religious values from public affairs and governmental policy formation, such separation has no antecedent in the early American republic.

21. *See* Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845) (holding that the First Amendment binds only the federal government; hence it does not protect the religious liberty of individuals from actions by states or municipalities).

into state-level politics and were eventually reflected in each state's constitution.

Important figures and events are considered here for their effect on American culture generally, and the United States Supreme Court in particular. Culturally, the American settlement is fairly depicted as the realization, both within American religion and by political elites, that both church and state benefit from the disestablishment of religion. Vocal figures such as John Locke and James Burgh in England, in addition to Elisha Williams, Isaac Backus, and John Leland in the colonies/states, tirelessly advanced this point until it made a permanent impression. As the idea of locating religion outside the auspices of civil government took hold, state legislatures codified the idea in their constitutions to accommodate their constituents. Drawing from this uniquely American achievement, the modern Supreme Court has sketched the church-state landscape in jurisdictional terms that envision the strong arm of the state as unable to reach those matters properly in the province of organized religion.

Part II of this paper documents the dual-authority pattern that has been a part of European civilization since the fourth century, as well as early Anglo-American church-state arrangements. Part III uncovers the writers and other significant figures that advanced the cause of disestablishment state by state before and after the American constitutional founding. While the Western pattern of dual authorities continued, of course, the American settlement uniquely limited the scope of civil power such that government was no longer competent in matters of doctrine, church governance, and other inherently religious matters. The prime movers in the disestablishment effort were, for the most part, religious people living out their religious understanding of the role of government and the nature of the church. Part IV touches on the modern Supreme Court's incorporation of this church-state settlement into the First Amendment and then identifies a few points that illustrate how both the right and left are attempting to push the Court in directions that would squander this rich heritage of religious freedom. Finally, Part V summarizes matters.

II. THE DUAL-AUTHORITY PATTERN CHARACTERISTIC OF THE WEST

A. The American Settlement

By way of brief overview,[22] disestablishment in America happened over a fifty- to sixty-year period. All the early European models (and there were several) assumed that the ultimate unity of the nation-state, hence its survival, required a union of its subjects or citizens around one religion.[23] Thus the coercive power of the state, its purse, and its other considerable resources were put behind one church or one religion. Colonial America shared this assumption, albeit in milder and abridged forms, as the American colonies initially absorbed various European patterns of church-state relations. Over time these models evolved and adjusted, differently from colony to colony, to their New World setting.

During the War of Independence, the ensuing Confederation, and then early republic (the period from 1774 to the 1830s), relations between church and state underwent a marked shift toward a new and decidedly non-European approach. In decline was the conventional argument that material government support for religion and religious institutions was necessary to ensure religion's salutary effect on public morality and civic virtue. Such virtue was surely thought to facilitate representative government and thus was of vital interest to an extended republic, republican government at the time being an experiment. Americans did not waiver on the proposition that a government by the people requires citizens who are prepared to take personal responsibility for the common good. Thus, the nation continued to expect religion to influence the *polis* significantly, with citizens capable of self-governance in turn carrying their personal values into collective politics and other public affairs.

In the early national period, religious voluntaryism[24] was on the ascendance. Church membership was soaring in the populist,

22. For a more detailed account of state-by-state disestablishment in America, see *infra* Part III.B–E.

23. *See* HAROLD J. GRIMM, THE REFORMATION ERA: 1500–1650, at 429–30 (2d ed. 1973).

24. Throughout this paper the use of the older spelling of "voluntaryism" is intentional. It acts as a reminder that voluntaryism represents a specific package of ideas about religion, the nature of the church, and the limited role of the state.

nonhierarchical churches often staffed by clergy without formal credentials. These churches embodied a more accessible and personal religion, often planted by revivals and circuit riders. American religion was undergoing a major transformation, one abandoning many remaining vestiges of the European Reformation past and moving on toward norms shaped by an altogether new American ethos that was caught up in individualism, progress, and frontier expansion. Under those influences, then, and factors such as the leveling of social classes in society and the disintegration wrought by large-scale immigration, the American theory of religious freedom pushed for the decoupling of formal ties between religious institutions and government institutions. To use a more modern descriptor, the church and its ecclesiastical affairs were deregulated.[25] Henceforth, the civil state had no legal authority, and its courts thus had no subject matter jurisdiction over those topics that were inherently religious and thus within the sole province of the church. Faith, if it was to be genuine, was acquired as a voluntary act, without Caesar's aid. Caesar was to twice refrain, neither interfering with nor materially supporting the gospel work of the churches.[26] In a phrase, the new American settlement envisioned a free church and a limited state.

At the same time, it was assumed (with just cause) that religion would continue to be a principal contributor to the formation of civic virtue. As such, Dr. Os Guinness characterizes the movement toward disestablishment as an "audacious gamble," for it would be "gravity-defying" to try to sustain the American republic without the civic virtues supplied by "its 'unofficial' faiths."[27] Yet, if the church was no longer a department of the state, then the task of maintaining a virtuous citizenry had been moved beyond the control of the

25. Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison, and the Religious Problem*, *in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 233 (Diane Ravitch & Joseph P. Viteritti eds., 2001); Roger Finke, *Religious Deregulation: Origins and Consequences*, 32 J. CHURCH & STATE 609 (1990).

26. *See* 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 765–80 (1941). The first edition appeared in 1883 and was the product of extensive travels throughout America by the British historian Lord James Bryce. Bryce found that even Episcopalian and Roman Catholic clergy favored the American settlement. *Id.* at 766.

27. OS GUINNESS, THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH 18–19 (1993).

state.[28] Thus a task thought vital to the state's survival was, in a "gamble," placed outside the state's power.

This new restraint on government power over religion was expected to yield a twofold benefit. One promised benefit was greater domestic tranquility concerning disputes over religious doctrine—matters now outside Caesar's legitimate concern for the public order.[29] Disputes over theology would continue to arise, of course, but their resolution—now not tied to taxes, officeholding, eligibility to vote, or other matters of secular law—would be thrashed out privately. The second expected benefit was that disestablishment would redound to the autonomy of the churches that, under the new settlement, had the freedom to succeed or fail by their own lights and by the appeal of their message. In turn, many believed that these invigorated churches would better perform their role (an unofficial one to be sure) in seeing to the teaching of morals and civic virtue.[30]

The momentousness of this paradigm shift cannot be over emphasized. The state pulling back from the regulation of religion and religious institutions was a major departure from the normal tendency of statecraft to grasp power rather than to let it go. William

28. In addition to the church, obviously families, neighborhoods, and schools also teach virtue. However, during the early republic, public schools were in their formative stage; thus, there was not a long history of looking to public schools to teach civic values. ROCKNE M. MCCARTHY ET AL., DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS 52–53 (1982) [hereinafter MCCARTHY, DISESTABLISHMENT]; ROCKNE M. MCCARTHY ET AL., SOCIETY, STATE, & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM 80–86 (1981) [hereinafter MCCARTHY, SOCIETY]. Additionally, where there were public schools, religion had a greater presence than is the case today. MCCARTHY, DISESTABLISHMENT, *supra*, at 53–70; MCCARTHY, SOCIETY, *supra*, at 86–92. Finally, during the national period families and neighborhoods often taught virtue from a more overtly religious perspective. All of this shows that it was no small gamble, from the perspective of a republic in need of virtuous and self-governing citizens in order to be stable, to privatize the inculcation of morals by way of disestablishment.

29. 2 BRYCE, *supra* note 26, at 767–68.

30. Occasionally one will read a formulation of the American historical settlement that suggests that the state was no longer to involve itself in the affairs of church and that the church was no longer to involve itself in the affairs of the state. This is false by half. It is true that the state was not to interfere with doctrine and other matters within the province of the church. However, while it is correct that church officials held no government offices or duties as a result of their ecclesiastical positions, clerics have always been free to teach on matters of public and political concern. Many churches did so, from opposing Cherokee removal from Georgia to demanding a halt to Sunday delivery of U.S. mails to urging laws prohibiting dueling. *See* JOHN G. WEST, JR., THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIL LIFE IN THE NEW NATION (1996).

Clancy puts the change down as "surely . . . one of history's more encouraging examples of secular modesty."[31] Max L. Stackhouse aptly observes how, as a result of this shift, the Establishment Clause implicitly acknowledged religious societies, as well as the government, as sovereign centers of authority:

> [The First A]mendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself. . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, nor only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.[32]

It is notable that America's highest positive law, the First Amendment, embodies this truism about the autonomy of religious organizations. Having yielded power, the civil state, as previously noted, received much back in the form of reduced political divisiveness over religious doctrine, as well as citizens who, if they professed a faith, were more genuine in their observance of it. No longer would opportunists be drawn to the church by the promise of state-conferred favors and emoluments.

Meanwhile, religious bodies newly acquired their independence as to those matters within their province, especially as to doctrine, polity, and governance. Like all true freedom, however, this independence came with responsibilities. The churches were free to fail, as well as succeed, in the marketplace for souls. Immediately preceding and during the Revolutionary War, church growth had

31. William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 23, 28 (1958).

32. Max L. Stackhouse, *Religion, Rights, and the Constitution*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

reached a plateau.[33] That changed[34] during the early republic, when some Protestant denominations grew substantially and others grew only in small increments.[35] The latter were unable or unwilling to

33. Jon Butler, *Why Revolutionary America Wasn't a "Christian Nation," in* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 187, 191 (James H. Hutson ed., 2000); MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 15, 161–65 (2002).

34. Nathan Hatch and John Wigger report that:

> The early American republic [was] . . . a period of great religious ferment and originality. The wave of popular religious movements that broke upon America in the generation after independence decisively changed the center of gravity of American religion, worked powerfully to Christianize popular culture, splintered American Christianity beyond recognition, divorced religious leadership from social position, and above all, proclaimed the moral responsibility of everyone to think and act for themselves. In this ferment, often referred to as the Second Great Awakening, Christendom witnessed a period of religious upheaval comparable to nothing since the Reformation—and an upsurge of private initiative that was totally unprecedented.
>
> The mainspring of the Second Great Awakening was that religion in America became dominated by the interests and aspirations of ordinary people. In the generation after the Revolution, American Christianity became a mass enterprise—and not as a predictable outgrowth of religious conditions in the British colonies. The eighteen hundred Christian ministers serving in 1775 swelled to nearly forty thousand by 1845. While the American population expanded tenfold, the number of preachers per capita more than tripled; the colonial legacy of one minister per fifteen hundred people [became] one per five hundred. This dramatic mobilization indicates a profound religious upsurge—religious organizations taking on market form—and resulted in a vastly altered religious landscape.

Nathan O. Hatch & John H. Wigger, *Introduction*, *in* METHODISM AND THE SHAPING OF AMERICAN CULTURE 13–14 (Nathan O. Hatch & John H. Wigger eds., 2001).

35. John Wigger notes:

> Older denominations rooted to traditional patterns of hierarchy steadily lost favor throughout the era. While the Presbyterians and, to a lesser extent, the Congregationalists and Episcopalians posted modest gains in absolute numbers, their rate of growth lagged far behind that of the Methodists and Baptists. This was true not only on the frontier but also throughout the United States. In the south Atlantic region, where the Methodists were prominent, the Episcopalians' share of church adherents dropped from 27 percent to 4 percent between 1776 and 1850. In cities such as New York and Baltimore, the one religious sentiment that working-class men and women in general seem to have agreed upon was a strong dislike for established, European-style clericalism. The early Methodist circuit rider James Quinn clearly understood the uniqueness of the American situation. Following the Revolution, wrote Quinn, "the anti-Christian union between the Church and state had been broken up, tithes and glebes could no longer be relied upon for Church revenue, and the religious orders of America were left free to choose their own course, and worship God, with or without name, in temple, synagogue, church, or meeting-house, standing, sitting, or kneeling, in silence or with a loud voice, with or without book."

adapt to the new environment of voluntaryism. Meanwhile, Catholics and, to a lesser extent, Jews, both small in number at the founding, not only were refreshed by the laissez-faire approach to religious economy but also increased their numbers through immigration and births.[36] All this occurred in the decades well before the Civil War.

This is the American church-state settlement in principle, but practice lagged behind principle. The practice, often unthinkingly, favored a "Protestant America."[37] But over a century and a half the practice would mature and fill out to meet the principle. Stated differently, Americans did not always foresee the full ramifications when lofty principle was later worked out at the retail level.[38] Withdrawal of financial support was one matter; the withdrawal of the state's verbal and symbolic endorsement of the dominant faith was thought to be quite another.[39] Further, as is often the case,

JOHN H. WIGGER, TAKING HEAVEN BY STORM: METHODISM AND THE RISE OF POPULAR CHRISTIANITY IN AMERICA 9 (1998).

36. EERDMANS' HANDBOOK TO CHRISTIANITY IN AMERICA 234–35 (Mark A. Noll et al. eds., 1983) (discussing Catholics) [hereinafter EERDMANS' HANDBOOK]; ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 25, 51–52, 65 (2d ed. 1984) (discussing Jews and Catholics); LEE J. LEVINGER, A HISTORY OF THE JEWS IN THE UNITED STATES 141–55 (2d rev. ed., 1935) (discussing immigration from Spain); *id.* at 175–78 (discussing immigration from Germany); *id.* at 261–65 (discussing immigration from Russia); JONATHAN D. SARNA, AMERICAN JUDAISM: A HISTORY 31–61 (2004) (discussing the growth of American Jews from the beginning of the War of Independence to about 1825); *id.* at 62–134 (discussing the growth of American Jews from 1825 to after the Civil War).

37. *See* HANDY, *supra* note 36, at 24–56.

38. See ISAAC A. CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA (1895), as an example of the transition from practice to principle. The author agrees that government should not adopt positive measures favoring Christianity, for that would be harmful to religion and beyond the limitations placed on a republic. *Id.* at 177–80, 341–49. But then the author goes on to argue that it is quite all right, even desirable, for the government to passively favor the Christian faith whenever opportunities involving religion find their way onto an official's desk. *Id.* at 243–57, 349–51, 363–65, 369–80.

39. History is rarely one dimensional. The civic republicans, while unable to preserve a system in which religion was actively supported with the financial resources of the state, did not disappear. The vestiges of the covenant theology linking church and state hung on in forms other than funding support. *See* NOLL, *supra* note 33, at 204, 206 (discussing older forms of covenant theology, elect nation, and chosen nation). A general Protestant Christianity was harkened to in oaths, legislative prayer, fast days, Thanksgiving Day prayer, patriotic song, pledges, and mottos. The civic republicans, with tacit concurrence of the disestablishmentarians, rationalized these passive supports as not inconsistent with the American church-state settlement. They reasoned that the Christian and Jewish faiths were essential to republican institutions—that law, or the source of law, had a sure foundation only

actual practice was uneven by locale, by issue, and by governmental body (federal, state, local). Accordingly, while the theoretical principle was in place almost everywhere by the 1830s, this did not prevent the settlement's logical outworkings from causing some latter-day surprises, inconsistency, and resistance as pockets of official favoritism toward the dominant Protestant culture were slowly withdrawn.

B. Reformation on the Continent

The American church-state settlement is a product of Western civilization, albeit a product that departs significantly from how relations between and church and state unfolded in Europe. A common point of entry into that larger history of church-state relations is the Reformation, which, it is properly noted, shattered Western Christendom and its unity in the one universal church at Rome. The beginning of that era, as important to Western political history as it is to religious history, is normally dated to 1517 when the disaffected monk, Martin Luther (1483–1546), nailed his ninety-five theses to the door of the Castle Church, which served as a sort of bulletin board for faculty and students at the University of Wittenberg.[40] Medievalists remind us, however, that the beginnings of Western constitutional theory did not start with the Reformation, or, for that matter, with the earlier Renaissance or the later Age of Enlightenment.[41] Rather, the birth and nurturing of constitutional thought came out of the interaction and competition of church and state, dating as far back as 1150. "Constitutional theory" encompasses the primary ideas of popular government and structural limits on lawfully constituted authority, as well as the working out of such technical details as apportioning representation and distributing

if rooted in God. This support was not coercive but only ceremonial; no one had to believe it, but the civic institutions, especially schools, would teach it. This is referred to as "civil religion." *See* HANDY, *supra* note 36, at 194–95; Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

40. Concerning Martin Luther generally, see ROLAND H. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER (1950); GRIMM, *supra* note 23, at 75–116. As to the Reformation on the Continent generally, see ROLAND H. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY (1952).

41. BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150–1650, at 1–7, 103, 107 (1982).

power between central and local authorities.[42] But these medieval accomplishments, impressive as they were, went to the ideas themselves, and not to their implementation. The practice of constitutional theory had to await events first set into motion by the Reformation's break-up of the ecclesiastical monopoly. No one claims that Christians on either side of the Reformation initially set out to work for constitutional republicanism. But that is what they wrought, along with religious tolerance and eventually the free exercise of religion, both similarly unintended developments.

In 1555, the Treaty of Augsburg ended, for a time, the fighting between Catholics and Lutherans in Germany.[43] This religious settlement—expedient, if crude—was *cuius regio, eius religio* ("whose rule, his religion"). While church and state were separate, the treaty ensured dominance of the state over the church by vesting in the prince the power to choose the faith of his realm. Elsewhere, the reformer John Calvin (1509–1564), working out of the city-state of Geneva, taught a church-state model composed of two entities with distinct responsibilities, neither of which could claim supremacy.[44] While Calvin's model resulted in less large-scale disruption than that of Augsburg, the state still enforced religious conformity; good standing in the established church remained a qualification for

42. In 1414, the emperor of the Holy Roman Empire called for a council to resolve the great schism that resulted in three individuals claiming the office of pope. The Empire invited lay representatives along with bishops to assemble at the German city of Constance, where voting took place on a national basis. There were five national language groups, and a unanimous vote of all five was required for the vote to be a binding act of the council. After one pope stepped aside and two others were deposed, in 1417 the council named a new pope, Martin V. The assembling and conduct of the council required many juridical innovations concerning representation, consent, and participation of the laity. EARLE E. CAIRNS, CHRISTIANITY THROUGH THE CENTURIES: A HISTORY OF THE CHRISTIAN CHURCH 247–50 (3d ed. 1996). The legal reforms became known as the conciliar movement. Although the new pope soon repudiated these reforms and reasserted papal absolutism, the legal innovations were later put to use in the task of building nation-states. TIERNEY, *supra* note 41, at 4–7; *see also* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 199–224 (1983) (identifying the reform and codification of canon law in the twelfth and thirteenth centuries—the consequence of the Papal Revolution of 1075 to 1122—as the beginning of Western legal thought and method). At its heart, the Western legal tradition is characterized by the dual authorities of church and state, and multiple authorities—local, regional, and national—within a single geographic area. HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION ix (2003).

43. Concerning the Peace of Augsburg generally, see GRIMM, *supra* note 23, at 211–13; NOONAN & GAFFNEY, *supra* note 12, at 120–22.

44. Concerning John Calvin generally, see GRIMM, *supra* note 23, at 255–300.

voting, citizenship, and political office. Yet another model, the Edict of Nantes in 1598,[45] gave the Huguenots (French Calvinists) freedom within Catholic France to worship in and control their immediate territory. The edict came after a stalemate in the fighting, which had gone on from 1562 to 1598. But this arrangement merely created a precarious religious pluralism, one in which the peace was only as good as the king's willingness to honor the edict. Sixty years later, King Louis XIV withdrew the toleration, scattering Huguenots as far as the American wilderness.[46]

In 1648, the Treaty of Westphalia ended the Thirty Years' War and culminated the series of wars first set in motion by the Reformation.[47] Catholics were left established in the south of Europe, while Lutherans and Calvinists were in control of the north. For many Europeans (in both the north and south), the carnage and destruction brought about by the wars discredited the churches, if not Christianity itself, and strengthened the hand of the secular rulers. This was especially true of Protestants, who were divided on religious questions and needed the military protection of the prince. The Westphalian settlement resulted in sovereign nation-states of growing importance and power, a unified Catholic establishment spanning the south, various Protestant national churches in the north, and religious dissenters in all these states.

Anabaptists alone contemplated a more extensive separation of church and state; for their efforts, civil and religious authorities hounded and often exiled them.[48] In 1527, a synod of Anabaptists had set down their beliefs in the Schleitheim Confession, which included argument for a more complete separation of church and state. The Confession professed the true church to be a free association of believers, faith to be a free gift of God, and that civil authorities exceed their rightful authority when they champion the word of God (or their version of it) by use of force.[49] Anabaptists

45. Concerning the Edict of Nantes generally, see CAIRNS, *supra* note 42, at 309–10; DE LAMAR JENSEN, REFORMATION EUROPE: AGE OF REFORM AND REVOLUTION 216–20 (1981).

46. In 1685, the king revoked the edict and forced 200,000 Huguenots to flee from France. CAIRNS, *supra* note 42, at 309–10. Some made their way to America.

47. Concerning the Treaty of Westphalia generally, see GRIMM, *supra* note 23, at 428–29.

48. Concerning the Anabaptists generally, see JENSEN, *supra* note 45, at 87–98.

49. BRUCE L. SHELLEY, CHURCH HISTORY IN PLAIN LANGUAGE 253–54 (2d ed. 1995); *see also* WILLIAM R. ESTEP, THE ANABAPTIST STORY 194–98 (rev. ed. 1975).

were thus the first Christians since before the time of Constantine I to profess a systematic faith without state support and without state superintendence.

C. Reformation in England

1. Catholic England

The Reformation in England was quite different from that on the European continent.[50] It was initially driven entirely by politics, with theology, brought in from the continent, later taking hold as events presented opportunities. The English Reformation commands special attention because of its direct influence on the American colonies, which were destined to become the first thirteen states of a new republic. Moreover, the Spanish colonies in Florida and the American Southwest, as well as the French colonies in the New World south of Canada, would ultimately be subsumed into the American church-state pattern, complete with government-supported Catholic missions.[51]

The English Reformation was precipitated by Henry VIII's desire for a male heir, which led to his taking a series of wives, eventually totaling six in number. When the formal schism came with the Act of Supremacy in 1534, Roman Catholicism had been in Britain for nearly 900 years.[52] Thus, long before Henry's frustration at being

50. Concerning the English Reformation generally, see JENSEN, *supra* note 45, at 137–63.

51. Although church-state relations evolved very differently in these territories while under European control, they were rapidly transformed both by American governance and vigorous Protestant evangelism. *See, e.g.*, Nola Mae McFillen, *Methodist Beginnings in Louisiana*, *in* THE LOUISIANA PURCHASE AND ITS AFTERMATH: 1800–1830, at 456–68 (Dolores Egger Labbe ed., 1998). *See generally* CHARLES EDWARDS O'NEILL, CHURCH AND STATE IN FRENCH COLONIAL LOUISIANA: POLICY AND POLITICS TO 1732 (1966).

52. Christianity was brought to the British Isles early in the fourth century. Already settled by Celts, the British Isles likely first received the seeds of the gospels from Roman merchants or settlers. The primitive Celtic church did not recognize the primacy of the bishop of Rome. In the fifth century, the invading Angles and Saxons drove the Celtic people into Wales, Scotland, and Northern England. CAIRNS, *supra* note 42, at 122–25. At the end of the sixth century, the Roman Church sent missionaries and converted Anglo-Saxons in southern England. Meanwhile, the Irish church, planted by St. Patrick, sent St. Columba as a missionary to the Scots. This missionary activity in turn brought the gospel message to northern England in the period 635–50. Differences between the Celtic and Roman churches proved to be confusing and disruptive. Thus, in 663 King Oswy of Northumbria called for a meeting at

unable to annul his first marriage to Catherine of Aragon and marry Anne Boleyn, the English crown and Roman Church had already struggled on several occasions.

The church in Britain began poor, but did not remain so. The church gained control over vast tracts of land, often held by monasteries, a significant source of wealth in the hands of neither the nobles nor the crown. These lands were normally free of taxation, but kings and nobles nonetheless sought to extract revenue. One tactic of the crown was to attempt to influence who was appointed to bishoprics and other high church offices. If ecclesiastics controlled great wealth and power within the kingdom, then it was natural for the king to seek influence, if not outright control, over these appointments. However, the papacy also claimed the power to exact revenue from the English clergy and control ecclesiastical appointments. The church often resisted a king's suggested appointments, fearing corruption should individuals be attracted to her offices out of worldly ambition or be otherwise unsuitable for clerical service. The papacy could defend itself by controlling the sacraments and threatening excommunication; these defenses proved effective in a time when being anathema (outside the church) was believed to have eternal consequences. As the feudal system receded and nation-states began to emerge, kings sought to consolidate their rule by encouraging feelings of nationalism. Now, not only was money flowing into the distant papal treasury, but the centralized authority of the Roman Church caused some leaders to fear the divided loyalty of subjects with their allegiance to a "foreign prince."[53]

a. Thomas à Becket. One early clash between church and crown, occurring during the reign of Henry II (1154–1189), forged a hero

Whitby to decide upon a church. The Roman Church carried the day and allegiance to the papacy followed. CAIRNS, *supra* note 42, at 171–72.

53. Concerning the church in England, the English crown, and papacy generally, see MARGARET DEANESLEY, A HISTORY OF THE MEDIEVAL CHURCH, 590–1500, at 92–103, 143–45, 174–86 (Routledge, reprint 1994) (1925) (discussing controversies concerning the crown's control over ecclesiastical affairs and investiture, papal administration and finance, and papal policy toward England); CAIRNS, *supra* note 42, at 202–11 (discussing rise of papacy and conflict with secular rulers, particularly kings of England); R. N. SWANSON, CHURCH AND SOCIETY IN LATE MEDIEVAL ENGLAND 140–251 (1989) (discussing the conflict between royal and papal definitions of jurisdictional competence in England, and economic activity of the church in England with respect to church lands).

of near mythic proportions out of an English cleric.[54] The king resented loss of the royal court's jurisdiction over those clergy charged with the commission of a crime. Known as "benefit of clergy," those under holy orders, when accused of a crime, were within the jurisdiction of the ecclesiastical courts with right of appeal to the pope.[55] When a vacancy occurred in the archbishopric of Canterbury, Henry urged the selection of his friend and chancellor, Thomas à Becket. Named to the office in 1162, Becket promptly resigned from Henry's court and became an uncompromising defender of the church's prerogatives.

Henry and Becket struggled over "benefit of clergy." Henry retaliated by causing criminal charges dating to Becket's earlier service as Chancellor to be filed against the Archbishop in the royal courts, a venue where Becket, of course, refused to appear. With legal judgments pending against him, Becket was eventually driven into exile in France, as was his extended family. Henry's position on jurisdiction of the royal courts was not without some merit, and more than a few English bishops supported him. Henry thus plausibly maintained that he was not antichurch as such. Rather, the dispute was narrower: one over the proper submission of clergy, once convicted of a crime in the ecclesiastical courts, to sentencing by the royal judges. Cross appeals to Pope Alexander III languished unresolved, for the pope neither desired to alienate Henry nor undermine the rule of ecclesiastical immunity. Displaced in France and disappointed by papal indecision, Becket reached an uneasy truce with Henry and returned to Canterbury in time for the Christmas of 1170. Still unreconciled with Henry, Becket proceeded to reopen wounds by excommunicating some English bishops who had earlier supported the king. Upon receiving this news, Henry was furious and reportedly expostulated, "Will no one rid me of this turbulent priest?"[56] Four knights, impelled by Henry's anger, appeared at Canterbury Cathedral on December 29, 1170, and slew Becket where he had retreated to the high alter. Christendom was shocked and quickly elevated Becket to martyr and defender of the church. Pope Alexander expedited the canonization of Becket, and

54. Concerning Becket generally, see NOONAN & GAFFNEY, *supra* note 12, at 68–74.

55. This immunity dates from 412 and was found in the Theodosian Code of Imperial Rome. *Id.* at 41. "Benefit of clergy" is not unlike present-day diplomatic immunity in the law of nations.

56. *See* LION HANDBOOK, *supra* note 15, at 290.

Canterbury Cathedral became a shrine to St. Thomas. Henry, for his part, did public penance. While the prudence of Becket's course—as well as the justice of his cause—is not above criticism, myth and martyrdom have caused the name of Thomas à Becket to be invoked through the ages whenever the church's autonomy is threatened by the state.

b. Magna Carta. Like the name Becket, *Magna Carta* holds a prominent place in the story of the two powers of state and church.[57] Innocent III, elected pope in 1198, was a pious and most able statesman who tamed, for a time, the rising monarchies in France, England, and the Holy Roman Empire. Innocent bettered King John of England, fourth son of Henry II, in an investiture contest involving the archbishopric of Canterbury, which had become vacant in 1205. John forced his choice for the position upon the monks of the archbishopric, who by election could put forth a candidate. John then offered the papacy a bribe to consummate the deal. Innocent rebuffed the bribe, refused to confirm John's nominee, and saw to the selection of a capable Englishman, Stephen Langton, then serving the papacy in Rome. John, in turn, would not accept Langton and barred his return to England. In 1207, when negotiations had failed, Innocent placed an interdict (withholding of sacraments) on all England and excommunicated John two years later. John was already unpopular with his nobles because of high taxes, general misgovernance, and English possessions in France had been reclaimed by the French. Further, at the suggestion of Innocent, King Philip of France was threatening to invade England. By 1213, John was compelled to back down to the pope. He even agreed to provide "restitution" to the church by acknowledging that he held his kingdom as a feudal vassal of the pope and committing to payment of 1000 marks each year.

After Archbishop Langton returned to England, certain barons revolted against John and prepared for war with the king. The king, now vassal to his overlord the pope, was assisted by a papal legate in his negotiations with the barons. Langton represented the English bishops. The resulting document, *Magna Carta*, averted the fighting and is an early monument to political reform and the emerging

57. Concerning the *Magna Carta* generally, see NOONAN & GAFFNEY, *supra* note 12, at 75–80.

principle of rule under written law. Agreed to June 15, 1215, on the small island of Runnymede in the Thames near Windsor, John acknowledged that certain enumerated rights were vested in English nobles, in the clergy, and in the church. *Magna Carta* contains sixty-three numbered clauses, of which the first, sixty-second, and sixty-third clauses, declare "that the English Church shall be free, and shall have her rights entire, and her liberties inviolate," and that all the "ill will, hatreds, and bitterness" of the recent conflict were pardoned.[58]

While still celebrated as a fountainhead of limited government and due process of law, it is little appreciated that the Great Charter was the direct result of the church intervening to check the pretensions of state absolutism. By all events the *Magna Carta* is a codification of the Norman-Anglo-Saxon mind that, along with the medieval papacy, not only differentiated the two spheres of church and of state but also illustrated the utility of church autonomy by enabling the church to mediate between the state and the people.[59]

2. The English reformation

The 250 years of English history beginning with Henry VIII provide the most relevant backdrop for the founding of the United States of America and formation of the American church-state settlement. During these years two English struggles overshadowed all others and directly shaped developments in the British colonies of the New World: 1) the separation of the English Church from that of Rome, and 2) the emergence of Parliamentary supremacy over matters previously within the prerogative of the crown. Neither struggle was about individual liberty as such, but both developments opened up space that later made such liberty possible.

a. The birth of the Church of England. The Reformation came to England in its own distinct way. Early in his reign, Henry VIII (1509–1547) was named *Fidei Defensor* (Defender of the Faith) by the pope for severely criticizing Luther's view that Catholics were

58. *Id.* at 77.

59. It is little known that a few months after John signed the *Magna Carta*, he asked Innocent to annul it because the document was signed under duress. Innocent agreed. Both John and Innocent died the next year. The Charter was reissued thereafter without controversy during the reign of Henry III (1216–1272). *Id.* at 76.

wrong to hold to seven sacraments.[60] Henry later squandered his papal favor due to his preference for a male heir to succeed him to the English throne. At its initial formation in 1534, the Church of England remained thoroughly Catholic, except that Henry displaced the pope as supreme head of the church. That single change, however, untethered the English church from Rome and made possible the doctrinal swing to Reformed Protestantism during Edward VI's (1547–1553) short reign. In 1536, Henry gave permission for the publication of an English-language Bible, which further aided the swing to Protestantism. The wider accessibility to scripture undercut any attempt by the Catholic priesthood to control interpretation of the Bible and its mediation to the laity.

The contest between church and state during the English Reformation is remembered popularly as the struggle between Henry and Thomas More (1478–1535). A successful lawyer and royal counselor, More became the first layman to hold the office of Chancellor. More's predecessor, Thomas Cardinal Wolsey, had failed to secure from the pope the desired annulment of Henry's marriage to Catherine of Aragon. Pope Clement VII was unwilling to grant the annulment, in large measure because Catherine was the aunt of the powerful Charles V, both King of Spain and Emperor of the Holy Roman Empire. Given the lack of headway with Clement, the willful Henry set a new course. In May 1532, Henry pressured a convocation of English clergy into agreeing that the king had the power to approve or disapprove the promulgation of a canon of the church. Believing that these actions by Henry presaged the king's break with the Roman Catholic Church, More resigned the following day.

In March 1533, Thomas Cranmer (1489–1556) was consecrated as Archbishop of Canterbury with Henry's support. In a rapid series of events Henry brought about a separation from Rome: in May of 1533, Cranmer annulled Henry's marriage to Catherine; in June, Henry married Anne Boleyn, who was then crowned as queen; and in July, the pope excommunicated Henry. Early in 1534, Parliament passed the Act of Supremacy, declaring the king the only rightful and supreme head of the Church of England. The law also required all subjects to disavow papal authority and swear an oath of allegiance

60. Concerning the English Reformation generally, see *id.* at 105–16.

to the new queen or be charged with treason.[61] In April 1534, although he had been in retirement for two years, More was summoned to take the oath—he refused. Parliament adopted the Treason Act later that year, and under that legislation the crown ultimately prosecuted More. Convicted in June of 1535 of refusing to repudiate papal authority over the church, More was executed on July 6, 1535. His quiet defiance out of allegiance to the Roman Catholic Church is remembered as a courageous act of religiously informed conscience in the face of the raw power of the civil state.

b. The remaining Tudors. Following Henry's death, the royal advisors to young Edward VI replaced the traditional Latin service with the English *Book of Common Prayer*, compiled by Cranmer in 1549, later modified and reissued in 1552. The *Book of Common Prayer* is still in wide use today, and it is often cited as one of the finest examples of prose in the English language. Also at Cranmer's urging, in 1553 the *Forty-two Articles of Faith* (later reduced to *Thirty-nine Articles*) were adopted, squarely positioning the Church of England along Protestant lines.

Frail Edward's death at age sixteen brought Mary Tudor (1553–1558), his eldest half-sister and daughter of the Catholic Catherine of Aragon, to the throne. As a Catholic herself, Mary was determined to lead England back into the Roman fold. She married Philip II, also a Catholic and heir to the Spanish throne. However, a long history of Spanish intermeddling caused many of Mary's subjects to view the link to Spain and, hence, to Roman Catholicism, as disloyal, if not an outright betrayal of English sovereignty. In little more than four years, Mary burned nearly 300 Protestants at the stake, including Cranmer, who had by then become a much-admired reformer of the faith. Emboldened by such martyrdom, as well as nationalist and Protestant sympathies, resistance stiffened to "Bloody Mary." A dramatized collection of the executions produced an influential English-language book, John Foxe's *Book of Martyrs* (1563). Second only to the Bible in its impact, the *Book of Martyrs* for more than two centuries excited English-speaking people, including colonial Americans, to abhor religious persecution and to regard Catholic rule as authoritarian.

61. *Id.* at 108; CAIRNS, *supra* note 42, at 323.

Upon Mary's death, Elizabeth I (1558–1603), Anne Boleyn's daughter, began her long and successful reign.[62] Elizabeth sought a "middle way" in religious matters, made necessary, as she saw it, for domestic peace in religious concernments and, by extension, for political stability of the kingdom. While Elizabeth would never have contemplated a return to papal supremacy, she also resisted a thoroughgoing Reformed (Calvinistic) Protestantism along the lines urged by a vocal group of subjects called "Puritans." Instead, Elizabeth pressed for adoption of the *Thirty-nine Articles of Faith* (1563), which were Protestant in all essentials, while retaining in the Church of England many of the high-church elements associated with Catholicism. Numerous military conflicts, as well as exploration and trade competition with Spain and France (both Catholic states), kept England's popular sentiment weighted against Catholicism.

Many Protestants fled to the continent during Bloody Mary's reign. While in Geneva and elsewhere they studied Reformed Protestantism and now, newly returned, they sought to change the Church of England under Elizabeth. The Puritans had a large following. Seeing little value in formal, impersonal religion, they desired to "purify" the Church of England along the lines of Calvin's Geneva and John Knox's Scotland. Puritans opposed the outer trappings of religion such as clerical vestments, the sign of the cross, saint's days, church statuary, and prayers recited from a common book, and they sought local church governance (majority rule or "congregationalism") rather than top-down control by bishops. Puritans believed that the people, assembled as believers, were the source of governance of the church, not the English crown. Elizabeth, for her part, preferred ecclesiastical governance by bishops, the appointment of which she controlled. This deepened public distrust of rule by bishops, a grievance passed down to colonists in revolutionary New England. While Elizabeth's "middle way" prompted some Puritans to break with the church and become Separatists or Baptists, most remained in the Church of England, hoping to bring about reform from within.

This tension and jostling between Puritans and the Church of England was soon to have considerable bearing on church-state relations in colonial America.

62. Concerning Elizabeth I generally, see JENSEN, *supra* note 45, at 263–94.

c. From the Stuarts to the Hanoverian succession. Elizabeth's death ended the Tudor line, and James VI of Scotland, a Stuart, became James I (1603–1625) of England. The Stuarts claimed to rule by divine right, which placed them in frequent conflict with both Parliament and Puritans. Calvin had taught that there was a right of resistance to despotic rulers, a doctrine the English Calvinists put into frequent practice. Suspected of Catholic sympathies, the Stuarts forced conformity to the high-church style of observance, as well as rule by bishops, familiar under Elizabeth.

Puritanism's more personal and emotional Protestantism was intertwined with sympathy for greater popular governance and Parliamentary rule. Under James' son, Charles I (1625–1649), the Puritans began to practice an aggressive resistance to monarchial absolutism and high-church Anglicanism. This led Charles to seek to rule without Parliament. However, his attempt to impose Anglican-style worship in Scotland in 1637, and the resulting Scottish revolt, forced Charles in 1640 to summon Parliament. A still more intense phase of Puritanism began with the split in Parliament (the Royalists or Cavaliers versus the Roundheads) and continued through the English Civil War (1642–1646), and the short-lived English republic, and culminated in Oliver Cromwell's autocratic state.[63]

Throughout the period of conflict with the Stuarts, many Puritans left for New England. Between 1629 and 1642, over 25,000 Puritans immigrated to the Massachusetts Bay Colony.[64] There, as Americans know, the Puritans sought to build a "city on a hill" that would serve as a beacon for what, in their vision, Mother England should become. Thus the church they planted in Massachusetts, Connecticut, and New Hampshire was Calvinist and congregational, governed not by bishops but by the members. The legality of congregational or member-led polity was questionable under their various charters and, consequently, a source of New England unease and sensitivity to later Anglican church planting in their midst.

The failure of the Calvinists to successfully organize a republic was followed by the restoration of the House of Stuart and the

63. Concerning the English Civil War generally, see JENSEN, *supra* note 45, at 390–94.

64. SHELLEY, *supra* note 49, at 297, 305.

return of Charles II (1660–1685).[65] The Restoration was, in part, a reaction against Puritanism, its politics and cultural conservatism. Puritan religious and political activities were severely restricted as a result. An example of this severity is illustrated by the Puritan John Bunyan, who partly wrote *The Pilgrim's Progress* (1678–1684) while in prison where he had been confined for preaching. Charles was succeeded by his less able brother, James II (1685–1688), who had earlier made a very public conversion to Roman Catholicism. James' second marriage was to Mary Beatrice, also a Catholic, and the birth of their son in June of 1688 appeared to ensure a Roman Catholic succession. Prompted by dissatisfaction with the inability of the Stuarts to accept the increasing power of Parliament and the concern over the likelihood of a Catholic succession, the English opposition invited Holland's William of Orange and his wife, Mary, elder daughter of James II by his first wife, to claim the English crown in 1688. William, a celebrated Protestant leader on the continent, accepted the invitation, landing in England and driving off James without a fight when the English army declared allegiance to William. This transition, called the Glorious Revolution, came with conditions to which William and Mary (1689–1702) were happy to oblige. The first condition was affirming the English Bill of Rights (1689),[66] and the second was acknowledging Parliamentary supremacy. The third condition was the adoption of the Act of Toleration (1689). This act extended legal recognition and, hence, official tolerance, to non-Anglican Protestants (Presbyterians, Congregationalists, Quakers, and Baptists), while leaving in place the establishment of the Church of England.[67] Roman Catholics

65. Concerning the period between the Restoration and the Glorious Revolution, see generally JOHN MILLER, POPERY AND POLITICS IN ENGLAND: 1660–1688 (1973); THE REVOLUTIONS OF 1688 (Robert Beddard ed., 1991).

66. There are provisions in the English Bill of Rights that foreshadow some clauses in the Bill of Rights of the United States Constitution, such as prohibitions on excessive bail and cruel and unusual punishments. However, the English bill is preoccupied with cataloging a series of grievances against James II, extracting commitments from William and Mary, and ensuring that a Roman Catholic would never again sit on the English throne. The English bill reads like an agreement between Parliament ("Lords Spiritual and Temporal and Commons") and the new king and queen. The "Lords Spiritual" are the Church of England clerics who also sit in the House of Lords. BASIC DOCUMENTS OF ENGLISH HISTORY 159–63 (Stephen B. Baxter ed., 1968).

67. *See* BARRY COWARD, THE STUART AGE, A HISTORY OF ENGLAND 1604–1714, at 318–20 (1980). Note the acceptance of the dual-authority relationship construct, characteristic of Western civilization: individual religious practices are freely exercised

remained a political threat and were therefore not tolerated under the act.

The throne passed from William and Mary, who had no children, to Mary's sister, Anne, who had seventeen children, none of which survived her. [68] Out of fear that the English crown might revert to the Roman Catholic Stuarts (called "Jacobites"), in 1701 Parliament adopted the Act of Succession, which vested the crown in the nearest Protestant relative of the passing monarch. At the time this was Sophia, the wife of the Elector of Hanover, and her descendants. Sophia was the fifth, and only Protestant, daughter of Elizabeth of Bohemia, James I's only daughter. Sophia died a few months before Queen Anne (1703–1714). Thus, in August of 1714, Sophia's son, George, became the first Hanoverian king of England, ruling as George I (1714–1727).

The English Reformation, moving as it did the supreme head of the church from pope to crown, allowed for greater state dominance of the church. Paradoxically, the disaffiliation of many English-speaking Christians from the papacy set in motion conditions that led to greater freedom for many dissenting Protestants and the non-Anglican churches they founded: Congregationalists, Separatists, Presbyterians, Baptists, Quakers, and Methodists. The Church of England, hardly able to control Christianity even within the English borders, was never able to sustain effective control in the distant American colonies. This development was almost inevitable when, in order to empty the country of sectarian divisions at home, the British crown encouraged its nonconformists, both Protestant and Catholic, to emigrate to America. But even in colonies such as Virginia, the Carolinas, Maryland, and Georgia, the Anglican establishment was during most times nominal and the church's control over religious concernments largely ineffective.

D. Colonial America Through the First Great Awakening

In the seventeenth century, the American colonialists carried with them to this side of the Atlantic the belief that political stability necessitated one religion and, hence, one established church. Rhode

(relationship between individual and state), but in the same regime one church among many is established by law (relationship between state and institutional religion). *Id.*

68. On succession from William & Mary to George I, see ERIC R. DELDERFIELD, KINGS AND QUEENS OF ENGLAND AND GREAT BRITAIN 94–106 (1975).

Island (founded by the redoubtable Roger Williams) and, to a lesser extent, William Penn's haven for Quakers in Pennsylvania, are the exceptions to the rule of importing European church-state patterns into the colonies. Most of New England, particularly Massachusetts Bay, Connecticut, and New Hampshire, were Puritan and, in the early years, kept that way by expelling those who taught a different faith. The primary reason these people had left England was to worship free of high-church Anglicanism. Their aim was not religious freedom for all, but freedom to follow God as they understood Him. Thus, the Congregational establishments planted here jealously resisted encroachment by Anglican missionary activity in New England, and Puritans were especially vocal at any suggestion that the Church of England create an American bishopric. The City of New Amsterdam with its Dutch Reformed Church was for a time established, whereas upstate New York and East Jersey were largely without an established church and were populated, along with the Dutch, by Scottish and Scotch-Irish Presbyterians and various German sects. The rest of the Middle Colonies, West Jersey, Delaware, and Pennsylvania, were under Quaker rule and thus without establishments, but they consciously and powerfully favored Protestantism in their laws. Virginia and the Carolinas initially had weak Anglican establishments.[69] Such was the religious landscape in these early planting years.

In colonies where there were Church of England establishments, there was a concerted push to strengthen Anglicanism in the years between 1684 and 1715.[70] The Anglican church thus reasserted itself in Virginia, North and South Carolina, and New York City,[71] and the crown brushed aside the freedom enjoyed by Roman Catholics in Maryland by establishing the Church of England there in 1692.[72] In 1684, the Puritans were severely challenged when the company charter of Massachusetts Bay Colony was revoked by Charles II, who

69. *See* S.D. MCCONNELL, HISTORY OF THE AMERICAN EPISCOPAL CHURCH: FROM THE PLANTING OF THE COLONIES TO THE END OF THE CIVIL WAR 23–25 (4th ed. 1890) (discussing establishment in Virginia); *id.* at 82–85 (discussing establishment in the Carolinas).

70. *See* Butler, *supra* note 33, at 189.

71. The Anglican Church was established in New York City in 1693 and reestablished in South Carolina in 1705, and North Carolina in 1715. The Anglican Church was established in Georgia (which was settled much later in the century) in 1758. CAIRNS, *supra* note 42, at 358.

72. *Id.* at 358, 363. The Anglican establishment in Maryland was the result of William and Mary asserting Protestantism in the face of Catholic threats.

installed Edmund Andros as royal governor in 1686.[73] Andros brought an Anglican chaplain with him to Boston and, when the Congregationalists refused to provide space for holding a worship service, constructed an Anglican church.[74] This missionary thrust required funding and leadership. The English formed the Society for the Propagation of the Gospel, which sent missionaries throughout British North America. A second organization, the Society for Promoting Christian Knowledge, produced several books and pamphlets, which it distributed throughout the colonies.[75] The Standing Order in New England,[76] while adjusting itself to greater secularism in the ranks, secured Puritan dominance by ensuring that church support was a matter of local option and local tax assessment; hence, the locally dominant faith would be the established church. The devolution of the Puritan establishment ensured that the Standing Order had a greater resiliency to the chorus of increasing criticism, the latter spearheaded by Baptists and joined by Anglicans,[77] and thus the established position of the Congregational Church in New England was able to survive well into the nineteenth century.

Seventeenth century colonialists thought of themselves in terms of their relationship with Mother England, rather than as one of several American colonies with common interests. The eighteenth-century religious expansion that peaked in the 1740s, known as the First Great Awakening (1720s–1750s), was the event that first prompted colonialists to think of themselves as interconnected Americans. The Great Awakening started as a series of local revivals, inspired by the teaching of such clergy as the Congregational pastor

73. SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 26 (1963).

74. *Id.* at 26–27.

75. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 133–35 (2003).

76. "Standing Order" was the term used in New England for the local majority denomination. The rigid Congregational polity of the Puritans allowed each community to select which religious tradition would be supported by the local religious assessment. The Puritans could comfortably boast of their local-option system, all the while secure in the fact that only the rarest of New England towns failed to establish their Congregational Church. 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 113–27 (1971).

77. *Id.* at 194–99 (discussing a sharp exchange between Rev. East Apthorp, an Anglican missionary, and Rev. Jonathan Mayhew, Congregational minister in Boston, over Anglican activity in New England).

and theologian Jonathan Edwards (1703–1758). Scottish and Scotch-Irish Presbyterians throughout the Middle Colonies and Dutch Reformed in New Jersey, small in number at the Awakening's outset, were as early as the 1720s caught up in the revivals and, as a result, their numbers greatly increased.[78] Between 1739 and 1740, the English clergyman, George Whitefield (1714–1770), made extended tours along the entire Atlantic seaboard. In 1740, Whitefield made public speaking stops in Georgia, South Carolina, Pennsylvania, New Jersey, New York, Rhode Island, Massachusetts, New Hampshire, Maine, and Connecticut, everywhere preaching to large crowds.[79] Stressing heart-felt experience, along with personal repentance and salvation, the movement reshaped American religion. Jon Butler reports that "[f]ully 85 percent of the colonial congregations that existed at the beginning of the American Revolution had been formed after 1700 and no less than 60 percent of these congregations had been formed after 1740."[80]

The innovations of the Great Awakening were itinerant evangelists addressing open-air crowds, preevent advertising, an appeal to one's emotion and resulting public displays of "enthusiasm," church-based revivals, and new models of leadership at the denominational level.[81] The approach was ecumenical, ignoring parish boundaries, and the technique of persuasion was force of message rather than deference to a minister's ecclesiastical office or formal education. Early democratic principles were at work here as well, since the approach appealed to all social classes, resulting in greater lay leadership in the new churches.

While initially welcomed for its renewal of interest in Christianity and resulting explosive church growth, the First Great Awakening's methods also drew criticism.[82] The appeal to emotionalism was thought excessive by many, and some of the settled clergy thought

78. CAIRNS, *supra* note 42, at 367; EERDMANS' HANDBOOK, *supra* note 36, at 101–02; CHARLES HARTSHORN MAXSON, THE GREAT AWAKENING IN THE MIDDLE COLONIES 149–51 (1920) (noting intercolonial nature of Great Awakening).

79. EERDMANS' HANDBOOK, *supra* note 36, at 107; LAMBERT, *supra* note 75, at 135–36.

80. Butler, *supra* note 33, at 190.

81. *See id.*; EERDMANS' HANDBOOK, *supra* note 36, at 127–30 (essay by Harry S. Stout).

82. LAMBERT, *supra* note 75, at 136–52.

the call for renewal a criticism of the existing order.[83] In New England, Congregationalists split into factions known as "new lights" and "old lights," with those favoring the Awakening and its methods organizing their own churches. Calvinism was nonetheless renewed and Edwards emerged as a leading expositor of orthodoxy, celebrated to this day as American's greatest theologian.[84] Edwards eventually became president of what is now Princeton University in New Jersey, although he died soon thereafter from a smallpox inoculation gone bad. In the Middle Colonies, Scottish and Scotch-Irish Presbyterian churches were likewise divided into rival bodies of "new side" and "old side."[85]

In the late 1740s and early 1750s, a "new side" Presbyterian pastor out of New Jersey, Samuel Davies, expanded the reach of his church into the Virginia tidewater, often over the resistance of local Anglicans.[86] Baptist gains in the north are hard to measure, with some Congregationalists becoming Separatists and eventually Baptists, and some of these converts moving south where they had greater freedom.[87] In the Southern Colonies, however, Baptists grew substantially as a result of the Great Awakening.[88] For example, in Sandy Creek, North Carolina, in just three years of revivals enough Baptist churches were planted that they were able to form an association. These lay-trained Baptist clerics were farmers during the week and preachers on Sunday. They were especially effective in reaching the laboring classes and slaves, a development irritating to Anglicans who typically were of an elevated social class.[89]

83. MEAD, *supra* note 73, at 31 ("[The settled clergy] correctly sensed that the revivalists stressed religious experience and results—namely conversions—more than correctness of belief, adherence to creedal statements, and proper observance of traditional forms. They knew that in the long run this emphasis might undermine all standards.").

84. *See generally* GEORGE MARSDEN, JONATHAN EDWARDS: A LIFE (Yale 2002).

85. *See generally* EERDMANS' HANDBOOK, *supra* note 36, at 116–23.

86. *See* LAMBERT, *supra* note 75, at 136–40; GEORGE WILLIAM PILCHER, SAMUEL DAVIES: APOSTLE OF DISSENT IN COLONIAL VIRGINIA 119–34, 169–70 (1971) (describing the successful efforts of this "new side" Presbyterian leader in working under the Virginia law requiring non-Anglican ministers to obtain a license to preach).

87. CAIRNS, *supra* note 42, at 368–69; EERDMANS' HANDBOOK, *supra* note 36, at 117; MEAD, *supra* note 73, at 34.

88. EERDMANS' HANDBOOK, *supra* note 36, at 117.

89. *See generally* Butler, *supra* note 33, at 193–94; *see also* MARK A. NOLL, THE RISE OF EVANGELICALISM: THE AGE OF EDWARDS, WHITEFIELD AND THE WESLEYS 175–77, 182 (2004) (recording the spread of Christianity to slaves in Georgia, South Carolina, and Virginia by white Moravians, Methodists, Baptists, and Presbyterians during 1755 to 1770).

Notwithstanding the controversy and associated church splits, the Great Awakening was the first intracontinental movement that began drawing Americans together as a common people, a people that stood apart from Great Britain. Traditional authority based on formal education and ecclesiastical ordination was challenged, and greater lay involvement furthered the process of leveling the social classes. Part of this inchoate sense of intercolonial unity was that the essentials of Christian faith transcended denominational lines as well as national origin, reaching all classes of Americans who, as they saw it, were as one and equal before their God. Denominations, with the possible exception of the Church of England, shed their Old World ethnicity and took on a uniquely American stamp.

Eighteenth-century Americans and, in time, American revolutionaries and founders of the new nation, thus lived in an era that was both a piece of, as well as opposed to, an English pattern of crown dominance of the Church of England, with its off-again, on-again tolerance for dissenting Protestants, and a persistent, at times virulent, suspicion of Catholic political plotting and a disdain for their "Romanish" religious observance. The Church of England was variously resented, pitied, or ignored by large numbers of Americans, and often for the same reasons.[90] Back in domestic Britain the crown promoted, as well as interfered with, the mission of the English church, right down to naming bishops and other ecclesiastics, as well as requiring prayers from a common book and high-church liturgy. Anglican clerics were predisposed to indifference toward the English laity, to whom they were not accountable, because upon "taking the cloth" their focus was on advancement in the ecclesiastical hierarchy, rather than sacrificial service in a difficult mission field. The Church of England, while powerful and privileged, was simultaneously perceived by many Americans as little more than a projection of British foreign policy and aims of state. Thus, political squabbles

90. *See* EERDMANS' HANDBOOK, *supra* note 36, at 49–52 (giving as winsome an account as is possible of the work of the Church of England in the American colonies to the beginning of the Revolution); *id.* at 133–34 (describing vigorous resistance to Anglicanism by Congregational and Presbyterian Churches). *Cf.* ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA 246–47 (Arno Press & The New York Times reprint 1969) (1844) (holding Anglican clerics in disdain); EDWIN S. GAUSTAD, PROCLAIM LIBERTY THROUGHOUT ALL THE LAND: A HISTORY OF CHURCH AND STATE IN AMERICA 17–21 (2003) (noting that American colonists feared the Church of England because of its close association with the power of the English crown).

with Great Britain often translated as well into political—not religious—disagreements with the Church of England.

The religious situation on the eve of the American Revolution (1774–1783) had been altered, to be sure, from that following the high watermark of the First Great Awakening in the 1740s. Interest in religion cooled in the years immediately before the Revolution,[91] and war on one's own soil is never kind to church life. But before turning to the condition of the nation's faith in the aftermath of the Revolution and how spiritual life was again revived, we take up four figures who wrote before the War of Independence and were harbingers of the American church-state proposition that came on the heels of the war.

E. Pre-Revolution Forerunners of the Settlement

There were a variety of factors that brought about social and political change in the American colonies. One of the primary influences was the political theory espoused by John Locke. Locke's theory was imbibed by most educated Americans but also adapted to suit the exigencies facing the colonists. Many political and social activists in England shared a similarity of purpose and point of view with their colonial colleagues. However, the uniquely American context that drove colonial dissenters was a dogged allegiance to the Bible (as they understood it) and a refusal to submit their understanding to that of the established church.

1. John Locke

Although today more commonly thought of as a political philosopher, John Locke (1632–1704) produced more treatises on popular theology than on the nature of government. As the Age of Enlightenment (elevating reason and experience) clashed with European Christianity (with its reliance on biblical revelation), Locke wrote to harmonize reason with faith. While Locke's own profession of faith never wavered, his essays argued for a simple and reasonable Christianity devoid of either emotion or mystery. Essential doctrines are few and easily intelligible to the common person, he argued, dismissing most creedal debates as squabbles over unessential points.

91. Butler, *supra* note 33, at 191.

In his influential *A Letter Concerning Toleration*,[92] first available in English in 1688, Locke argued that the "business of true religion" was the worship of God and was best concerned with securing immortality in the hereafter. The corollary, for many in Locke's audience, was that if the church is confined to purely religious matters such as worship and securing entry to heaven, then the matters of a nation-state's laws and the people's common public life were within the unquestioned jurisdiction of the state. Thus, when it comes to the church-state divide, the modern reading of Locke has him seeking to cabin and privatize, and thus pacify, the political consequences of religious faith.

Concededly, Locke's *Two Treatises of Government*[93] was widely read and influential, along with many other books, by American patriots busy framing a new republic. On matters of religious freedom, however, the manner in which Locke was received in eighteenth-century America was different than how he is typically portrayed today.

2. Elisha Williams

Locke's works were warmly welcomed in the American colonies, and his theory of government greatly influenced the political class. Often ignored, however, is just how Locke's writings were actually used by religious thinkers in America.

A 1744 essay by Elisha Williams (1694–1755) provides a good example of how early Americans adapted Locke's theories to the age-old problem of church-state relations. Williams' *The Essential Rights and Liberties of Protestants*[94] was printed as a letter critical of the Act for Regulating Abuses and Correcting Disorders in Ecclesiastical Affairs, legislation adopted in Connecticut in May of 1742. He was uniquely qualified as the letter's author. Williams had graduated with honors from Harvard College in 1711, and had gone on to study theology and law, all before teaching at Yale College between 1716

92. JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett 1983) (1689).

93. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1960) (1689).

94. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS: A SEASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE AND THE RIGHT OF PRIVATE JUDGMENT IN MATTERS OF RELIGION WITHOUT ANY CONTROUL FROM HUMAN AUTHORITY (1744).

and 1719. One of his students was Jonathan Edwards, the most prominent American behind the First Great Awakening. Williams represented his district in the Connecticut General Assembly beginning in 1717, as well as serving as pastor of Newington Parish from 1722 until he assumed the office of Rector at Yale College in 1726. Leaving Yale in 1739, Williams returned to the General Assembly from 1740 to 1749, during which time he would have been involved in the legislation that occasioned his essay.[95] Williams' familiarity with both law and theology, as well as his familiarity with the legislative debate behind the Act of 1742, which he opposed, are evident in this pamphlet.[96]

With Locke's exposition in his *Two Treatises of Government*[97] serving as a foundation, Williams argues from the premise that a believer's right to judgment in religious questions is inalienable.[98] He

95. *See* 10 DICTIONARY OF AMERICAN BIOGRAPHY 256–57 (Dumas Malone ed., 1964).

96. Butler attributes the Connecticut Act of 1742 to "old light" Congregationalists, in defense of their establishment, trying to blunt the efforts of Baptists and "new light" Congregationalists. "The act effectively banned unapproved itinerant preaching, ordered ministerial associations not to 'meddle' in affairs outside their own jurisdiction, and allowed magistrates to eject nonresidents from the colony if they preached without the permission of the local clergymen and a majority of his congregation." Butler, *supra* note 33, at 193.

97. In the *Two Treatises*, Locke presents a version of social contract theory that postulates that people are initially born into a state of nature, a condition in which every person possesses the right to life, liberty, and property, and the power to execute such rights by the law of nature. However, because of the proclivity of each person to carry out the law of nature to his or her own advantage, no effective common law exists among this gathering of people. The state of nature thus tends to break down into conflict and violence. To escape this breakdown and its consequences of war and poverty, people enter into a social contract. They mutually consent to give up their power to execute the law of nature in exchange for governance under the rule of law as expressed by the majority. Rights such as property, which in the state of nature are left to each individual to secure for him or herself, are now protected by a common civil law enforced by a government whose ultimate authority is derived from the consent of the governed. However, there are certain natural rights that by their very nature cannot be surrendered to the government, even knowingly and by consent. Such rights are thus said to be "inalienable." Using biblical precepts, Locke argues that the right of judgment in religious matters, that is, the free exercise of religion, was an inalienable right. LOCKE, *supra* note 92.

98. WILLIAMS, *supra* note 94, at 8. Williams reasons:

> No Action is a religious Action without Understanding and Choice in the Agent. Whence it follows, the Rights of Conscience are sacred and equal in all, and strictly speaking unalienable. This *Right* of *judging every one for himself in Matters of Religion* results from the Nature of Man, and is so inseperably connected therewith, that a Man can no more part with it than he can with his *Power* of *Thinking*: and it is equally reasonable for him to attempt to strip himself of the *Power* of *Reasoning*, as to attempt the vesting of another with this Right. And whoever invades this Right of another, be he *Pope* or *Caesar*, may with equal Reason assume the other's Power

then draws four corollaries from this premise. First, he denies that civil government has any jurisdiction over articles of faith, creeds, forms of worship, or church governance.[99] Williams anticipates the objection that some matters of ecclesiastical debate are not settled in scripture and are open to human interpretation and determination. In answer, he reminds the reader that human government has no power to establish a universal rule that the Author of the Faith chose to omit. However, should scripture command a particular observance without articulating the specific means thereof, Williams asserts that the only appropriate body for determining the particular rule of observance is the worshiping assembly.[100] More to the point, the civil government has no power to settle such disputes.[101]

> of Thinking, and so level him with the Brutal Creation . . . Man may alienate some Branches of his Property and give up his Right in them to others; but he cannot transfer the *Rights* of *Conscience*, unless he could destroy his rational and moral Powers, or substitute some other to be judged for him at the Tribunal of GOD.

Id.

99. *Id*. at 13. In Williams' words:

> That the *civil Authority* hath no Power to make or ordain Articles of Faith, Creeds, Forms of Worship or Church Government. This I think evidently follows from what has been said, that they can have no Power to decree any *Articles of Faith*. For these are already established by CHRIST himself; and for *Mortals* to pretend any Right of Determination what others shall believe, is really to usurp that Authority which belongs to CHRIST the supreme King and Head of his Church; who only hath and can have a Right to prescribe to the Consciences of Men, as is evident from the last foregoing Head.

Id.

100. *Id*. at 14–16. Concerning such matters being entirely in the province of the church, Williams argued:

> In such Cases where any Thing is *necessary* to be determined in order to any worshipping Assembly's obeying CHRIST'S Laws, the *Power* of such Determination lies with *such worshipping Assembly* . . . And because [Christ's] Law [to worship] must be obeyed, and can't be obeyed without such a Determination of Time & Place; therefore it is, that Man may determine them, and is warranted to do it. And every worshipping Assembly best knowing their own particular Circumstances, and being best able to judge what may be convenient or inconvenient in the Case, are won't to fix Time and Place for the Purpose: And who has right to intermeddle in the Matter without their Desire or Consent, I can't imagine. This is a Right our worshipping Assemblies Claim, and I know not that any call it in Question.

Id. at 16.

101. *Id*. at 17. Discussing doctrinal differences among religious communities, Williams says:

> Yet if Christians do apprehend there is any *Necessity*, every worshipping Assembly must in that Case determine for themselves. They may be under a great Mistake in determining that to be *necessary* which may not be so: but herein I think no others have a Power to determine for them. Not the *civil Authority*: for the Reason before

Second, Williams states that the government has no legitimate power to establish any system of faith as binding on the people, whether by affirmation or penal law.[102] Much of this discussion highlights the disastrous effects of ecclesiastical establishment on an individual's freedom of conscience. Williams points out that dissenters are just as likely to be right as an established church is to be wrong.[103] He also underscores the corrupting effect of establishment on the ministries of the church.[104] Williams rejects the

given, *viz.* That the Ceremony or particular Mode of performing an Act of divine Worship, has no Relation to the *Ends* of a civil Society: The *Preservation* of *Person* or *Property*, no Ways requires the giving up this Liberty into the Hand of the civil Magistrate. This therefore must remain in the Individuals. The civil Interest of a State is no more affected, by *kneeling* or *standing* in *Prayer*, then by praying with the *Eyes shut* or *open*; or by making the Figure of a *Triangle* or a *Cross* upon a Person in *Baptism*, than by making no Figure at all. They have indeed none of them any Relations to the *Ends* of a civil Institution. The civil Authority therefore have no Business with it.

Id.

102. *Id.* at 18–19. Williams opines:

The next *Corollary* I shall deduce from the Principles before laid down is, That the *civil* Authority have no Power to establish any Religion (*i.e.* any Professions of Faith, Modes of Worship, or Church Government) of a human Form and Composition, as a *Rule* binding to Christians; much less may they do this on any *Penalties* whatsoever. Religion must remain on that Foot where Christ has placed it. He has fully declared his Mind as to what Christians are to believe and do in all religious Matters: And that *Right* of *private Judgment* belonging to every Christian evidenced in the preceeding Pages, necessarily supposes it is every one's Duty, Privilege and Right to *search the sacred Writings* as Christ has bid him, and know and judge for himself what the Mind and Will of his only Lord and Master is in these Matters. It does, I think, from hence follow, that no Order of Men have any Right to establish any Mode of Worship, &c. as a Rule binding to particular Christians.

Id.

103. *Id.* at 20. Pointing out this logical possibility, Williams says:

Humane Establishments in Matters of Religion, carry in them no Force or Evidence of Truth. They who make them are no Ways exempt from humane Frailties and Imperfections: They are as liable to Error and Mistake, to Prejudice and Passion, as any others. And that they have erred in their Determinations, and decreed and established Light to be Darkness, & Darkness to be Light, that they have perplexed the Consciences of Men, and corrupted the Simplicity of the Faith in CHRIST, many Councils and Synods and Assemblies of State are a notorious Proof.

Id.

104. *Id.* at 24. Alluding to false teaching and notable martyrs, Williams argues:

This Principle, that a humane religious Establishment is a Rule *binding* to Christians, does eternally militate with those plain Commands of the supreme Lawgiver; is big with the Absurdities I have just hinted at, and numberless more; has proved the grand Engine of oppressing Truth, Christianity, and murdering the best

idea that religious uniformity is necessary for civil peace. Rather, he argues that unity of faith and uniformity of practice are not possible with or without establishment, and proposes that establishment actually disturbs the domestic peace it is meant to promote.[105] He closes this point by stating that a true friend of the church is an enemy of establishment.

Third, Williams enunciates an obligation owed by the government to protect the right of religious judgment from encroachment by civil law.[106] He vests this right in churches as constituted communities in the same way it is vested in individuals.[107]

Men the World has had in it; promoting and securing Heresy, Superstition and Idolatry; and ought to be abhorred by all Christians.

Id.

105. *Id.* at 39–40. Williams writes:

For if this Conformity to his Establishment be *necessary* to the Peace of the State, then the civil Magistrate has a Right to prevent a Non-compliance with such Establishment; and if lesser Penalties will not do it, (as Experience has perpetually shown they will not) then they must rise so high as *Death*, or *Banishment*: For a Right to prevent such Non-compliance, that does not amount to a Right to prevent it effectually, is no Right to prevent it at all. . . . Whence it is but a *genuine Consequence*, that civil Government is one of the greatest Plagues that can be sent upon the World; since it must, in order to keep Peace in it, be perpetually destroying Men for no other Crime but *judging for themselves* and *acting* according to their *Consciences* in Matters of *Religion*; (and so perhaps very often the best Men in the State;) and all this in vain too, as to the proposed End, *viz.* Uniformity of Practice in Religion, that being for ever out of their reach.

Id.

106. *Id.* at 44. Williams opens this discussion saying:

That the *civil Authority* ought to *protect all their Subjects* in the Enjoyment of *this Right of private Judgment* in Matters of *Religion*, and the *Liberty* of *worshipping* GOD according to their *Consciences.* That being the *End* of civil Government (as we have seen) *viz.* the greater Security of Enjoyment of what belongs to every one, and *this Right of private Judgment*, *and worshipping* GOD according to their *Consciences*, being the *natural* and *unalienable Right* of *every Men*, what Men by entering into civil Society neither did, nor could give up into the Hands of the Community; it is but a just Consequence, that they are to be *protected* in the *Enjoyment* of *this Right* as well as any other.

Id.

107. *Id.* Williams continues:

A worshiping Assembly of Christians have surely as much Right to be *protected* from Molestation in their Worship, as the Inhabitants of a Town assembled to consult their civil interests from Disturbance [etc]. This Right I am speaking of, is the most valuable Right, of which every one ought to be most tender, of universal and equal Concernment to all; and *Security* and *Protection* in the Enjoyment of it the just Expectation of every Individual.

Id.

Returning to an earlier point, he argues that civil peace requires equality among sects—not establishment.[108]

Finally, Williams supposes that the right of private judgment in religious questions applies not only to individuals, but also to a worshiping assembly's right to incorporate as a church and define its own modes of worship and discipline.[109] Thus the right of private judgment in religious concernments extends from individuals to the organized churches they create.[110] In forming a church, the individual voluntarily accepts the decisions of the group, but he reserves the right to withdraw in case of conflict with conscience.[111] The worshiping assembly's independence extends to choosing its own ruling officers.[112]

A reader may sense in Williams a preoccupation with individual rights while seemingly caring less for the autonomy of the church. However, Williams writes over against the brooding presence of New England's Standing Order and in a time when the respective jurisdictions of church and state were more readily distinguishable.

108. *Id*. at 46. In Williams' words:

> In a Word, this is the surest Way for the Ease and Quiet of Rulers, as well as Peace of the State, the surest Way to engage the Love and Obedience of all the Subjects. And if there be divers religious Sects in the State, and the one attempts to offend the other, and the Magistrate interposes only to keep the Peace; it is but a natural Consequence to suppose that in such Case they all finding themselves equally *safe*, and *protected* in their Rights by the civil Power, they will all be equally obedient. It is the Power given to one, to oppress the other, that has occasioned all the Disturbances about Religion.

Id.

109. *Id*. at 46. Williams applies his conclusions to both:

> It also follows from the preceeding Principles, that *every Christian* has *Right* to *determine* for himself *what Church to join himself to*; and *every Church* has *Right* to *judge* in *what Manner* GOD is to be *worshipped* by them, and *what Form of Discipline* ought to be observed by them, and the *Right* also of *electing their own Officers.*

Id.

110. *Id*. at 47. Williams makes this point by saying: "These Churches are all of them as free to think and judge for themselves, as they were before such Agreement; their Right of private Judgment not being given up, but reserved entire for themselves, when they entered into any such supposed Agreement." *Id*.

111. *Id*. Williams continues: "So also if a greater or lesser Number of Christians in any particular Church, shall judge another Way of Worship, or Method of Discipline, more agreeable to the Mind of CHRIST, than what is practiced in that Church; they have Right to withdraw, and to be embodied by themselves." *Id*.

112. *Id*. ("So also from the same Premises it follows, that every Church or worshipping Assembly has the *Right* of *choosing its own Officers*.").

Establishment lent the Congregational Church the coercive executive power of the state to be used in the enforcement of ecclesiastical concerns. The freedom Williams demands involves not only the individual's right to the free exercise of religion, but also the retained (i.e., inalienable) power among like-minded believers to form and sustain a church that is independent of the state. Accordingly, these believers should determine for themselves the "true church" for their membership, allegiance, collective worship, and unfettered practice—unfettered by either state or Standing Order.

Williams writes as a minority voice protesting the Act of 1742. It is striking, however, that just a little more than a half century later his line of argumentation aligns nearly perfect with a new majority sentiment, namely the church-state settlement, which coalesced during the early American republic. While no connection can be made between Williams and any specific figure in the coming struggle for disestablishment, his essay is valuable in that it shows how Americans were adapting Lockean thinking to the church-state question in this period.

3. James Burgh

In the years shortly before the American Revolution, a group of Whigs in England readily identified with the colonial cause.[113] Styling themselves as "Real Whigs," the group viewed the American colonies as a model of what a reformed England should look like. Prominent figures in this group, such as Richard Price, Catharine Macaulay, and John Wilkes, maintained close personal ties with various colonial

113. COLIN BONWICK, ENGLISH RADICALS AND THE AMERICAN REVOLUTION 28 (1977). Bonwick writes:

> One immediately manifest feature of the radicals' experience was its richness. They enjoyed far closer and stronger connections with America and its inhabitants than did most of their contemporaries. Many had close personal associations with individual colonists, sometimes through personal meetings in England, sometimes by correspondence, and they eagerly seized the opportunities to discuss a wide range of matters of common concern, including, of course, the growing tension between Britain and America. In particular, the radicals were very well informed as to political developments since they counted many of the Revolutionary leaders as their friends. The understanding made possible by these personal ties was fortified by the ready availability in England of numerous commentaries on American life and society and many of the pamphlets and public papers through which the patriots elaborated their arguments.

Id. at 28–29.

ambassadors, including Benjamin Franklin, Arthur Lee, Francis Dana, and Josiah Quincy, Jr.[114] This alliance was strengthened by steady correspondence across the Atlantic and the publication of pamphlets, tracts, and treatises of each party in the other's territory.[115]

114. *Id.* at 27–32. Bonwick's lengthy discussion includes the following:

> Of all Americans who visited England before the Revolution, pride of place must be given to Benjamin Franklin. . . .
>
> . . . Probably the most celebrated of Franklin's informal societies in London was the "Club of Honest Whigs," which became his favorite meeting place. Among its twenty-five members were [Richard] Price, [Joseph] Priestly, [Andrew] Kippis, and the schoolmaster James Burgh . . . .
>
> No one could match the peerless Franklin, but several other colonists were friendly with radicals in London before returning home to become prominent in the Revolution. One was Arthur Lee; his activities aptly illustrate one aspect of the Anglo-American connection . . . .
>
> . . . Francis Dana and Josiah Quincy, Jr., of Massachusetts stayed for a short time but both met Price, who was greatly impressed by Quincy and commented that the American seemed to be "an able and zealous friend to his country."

Id. at 29–32. Historian Frank Lambert makes a parallel argument concerning the influence of "Radical Whigs" in America from the 1720s to the Revolution. He names John Trenchard and Thomas Gordon and their essays collected in a volume titled *Cato's Letters* as impacting events in America. The essays were reprinted in America by James and Benjamin Franklin. LAMBERT, *supra* note 75, at 185–86. The Whig position was that concentrations of power lead to corruption and thus a denial of liberty. As such, religious establishment was harmful to the church and genuine faith, a faith thus unable to generate civic virtue. The position of the Whigs joined nicely with religious dissenters in bringing about disestablishment. *Id.* at 187–91, 202, 211, 215, 221.

115. CARLA H. HAY, JAMES BURGH, SPOKESMAN FOR REFORM IN HANOVERIAN ENGLAND 41 (1979). Hay describes this correspondence specifically:

> In the turbulent years immediately prior to the American Revolution colonial patriots and English radicals very deliberately courted each other's support and solicitude. Catharine Macaulay's home, for example, became a notorious rendezvous for Anglo-American dissidents. There James Burgh spiritedly discussed current politics with Americans like Benjamin Rush. The colonial agent, Arthur Lee, joined the Bill of Rights Society to proselytize for America and arranged for complimentary copies of American pamphlets to be sent to reformers like Mrs. Macaulay and the Earl of Shelburne. In turn English radicals initiated correspondences with colonials and sent complementary copies of radical literature to the Patriots. The English publishers Charles and Edward Dilly served as a clearing house for many of these exchanges. It was Edward Dilly who sent John Dickinson the first two volumes of Burgh's Disquisitions as a small token of the author's respect for Dickinson's Patriotic Virtue. John Adams also received a complimentary set, perhaps through Dilly's offices, and was so impressed that he successfully worked to make the Disquisitions more known and attended to in several parts of America. He informed Burgh that his volumes were held in as high estimation by all my friends as they are by me. The more they are read, the more eagerly and generally they are sought for.

Id. at 41–42.

The Real Whigs published widely and, inter alia, engaged in discourse on how the Church of England establishment was corrupting religion. Their numerous and important contacts on the British side of the Atlantic influenced the thinking in America. While there were several distinguished figures in this group, James Burgh (1714–1775) became the faithful recorder of their ideas.[116] Burgh was raised in the home of a Scottish clergyman, and his early religious training had a profound effect on his life's work. Burgh moved south to England, where he faced greater social pluralism and experienced for the first time being a religious dissenter. Of his many works, ranging on topics from public morals to education to political theory, *Crito, or Essays on Various Subjects*,[117] and his magnum opus, *Political Disquisitions*,[118] deserve specific attention.

Crito is a collection of essays on then-current topics.[119] Burgh writes concerning two disastrous consequences of church establishment: first, the perversity of creating civil unrest over religious questions in the name of public order; and, second, the degradation of the clergy in the established church. At the heart of the matter is Burgh's belief that authority on religious matters is between each individual believer and God, and thus is in no way within the authority of the state.

An important theme throughout *Crito* is Burgh's handling of Roman Catholicism. In the dedication of Volume I, the author leaves no doubt concerning his own Protestant faith.[120] But when discussing the government's treatment of Catholics, Burgh denounces the suppression of Catholic worship as "violence" and insists that it is counterproductive.[121] He underscores the irrationality

116. *Id*. at 38–40.

117. JAMES BURGH, CRITO, OR ESSAYS ON VARIOUS SUBJECTS (1766).

118. JAMES BURGH, POLITICAL DISQUISITIONS (1774).

119. Topics included "religious toleration, contemporary politics, Rouseau's educational theories, and the metaphysics of evil." HAY, *supra* note 115, at 33.

120. 1 BURGH, *supra* note 117, at v–xxi.

121. 2 *id*. at 192–93. Burgh argues:

> The true state of the matter is, therefore, that suppressing a place of public worship by authority, is committing an act of *violence*, and breaking in upon the natural and unalienable *right*, which every man possesses, of *worshiping* what and how he *pleases*, unmolested by his fellow-creatures, as much as if he had not a fellow-creature alive, and accountable to GOD only; and all this with the more probable view of *increasing*, than diminishing the evil we wish to suppress.

Id.

of directing official violence toward Catholics on the ground that Catholicism produces violence and sedition.[122] Commenting on the difficulty of confining the coercive power of the state once unleashed, Burgh cautions, "If we begin with inflicting severities on *one* religious sect, I will not answer that we shall not proceed to break loose on *others*."[123]

The clergy of the English church were required to subscribe to a statement of belief in the *Thirty-nine Articles* of the Church of England. Burgh warns English citizens not to tolerate clergy who subscribe to the creed simply to gain a valuable office. He argues that rescinding the requisite signing of the *Articles* would actually help the church find religious truth. Instead, forced subscription eroded the integrity of the clergy. His distrust and disgust concerning the Church of England clergy is a theme that would later surface in his *Disquisitions*.

The foundation for Burgh's beliefs concerning church-state relations is one of dual authority. He reminds his readers that Christ's kingdom is not of this world.[124] Burgh viewed each individual believer as her own authority on Christian orthodoxy and the person whose judgment was to be preferred over that of the government.[125]

Burgh's greatest literary accomplishment was his three-volume *Political Disquisitions*. It is said that *Disquisitions* was "perhaps the most important political treatise which appeared in England in the first half of the reign of George III" (1760–1820).[126] Among its many topics, Burgh further develops the theme of establishment as

122. 1 *id*. at xiv–xv.

123. 1 *id*. at xvii.

124. 2 *id*. at 110–19. Burgh continues:

> The society of the christian church is not to be settled in *your* times. It is what the venerable Author was pleased to make it, two thousand years before you were born; not what every petty state, or every puny subdivision of religionists, think proper. *He* had a *right* to fix terms of admission. He has given *you no authority* in any such matters. On the contrary, he has expressly *forbid* your assuming it.

2 *id*. at 111–12.

125. 2 *id*. at 118 ("Put into the hands of the *people* the clerical emoluments; and let them give them to whom they will; *choosing* their public teachers, and maintaining them decently, but *moderately*, as becomes their *Spiritual* character.").

126. CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT AND CIRCUMSTANCES OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES 365 (1959).

corrupting of the church and its clergy. Like a good Whig, Burgh's cure for most government ills is a virtuous citizenry.[127] Concerning office holders, Burgh writes, "Virtue ought to be above all other considerations at all times, and on all occasions."[128] Such virtue is often derived from a vibrant and genuine religious faith. Burgh then revisits his rough treatment of the clergy in the established church. He claims that they are enemies of change,[129] and intimates that they have abandoned their pastoral obligations in favor of intellectual preoccupations.[130] In rejecting the idea that government sponsorship of religion is a means to a virtuous public, Burgh addresses church-state relations frontally:

> Governments have it not in their power to do their subjects the least service as to their religious belief and mode of worship. On the contrary, whenever the civil magistrate interposes his authority in matter of religion, otherwise than in keeping the *peace* amongst *all* religious parties, you may trace every step he has taken by the mischievous effects his interposition has produced . . . . A king, a statesman, or a magistrate, who does not know this, is very improperly situated in the high station he fills; yet all history exhibits proofs of their misconduct in this respect. They have perpetually harassed themselves and their people about matters of belief, and forms of worship, and have neglected the most important duty of their function, the regulating of the moral and political principles and manners of the people.[131]

Historian Carla Hay says of *Disquisitions* that "[t]he tome quickly secured the status in England and in America of a monumental reference work with the authority of a political classic."[132] Hay points out that "[a]n impressive number of America's

127. 3 BURGH, *supra* note 118, at 30, 410.

128. 3 *id*. at 217.

129. 1 *id*. at 468; 3 *id*. at 330.

130. 3 *id*. at 224–25. Burgh's accusation specifically was:

> The clergy of *England* ought, therefore to apply themselves to teaching in more ways than one. They ought not to think they have discharged the duty of their function, when they have *read* over a velvet cushion a learned and elegant discourse on some point in theology or in morals: a true and faithful pastor will consider it as the principle part of his duty to be intimately acquainted . . . with every inhabitant of his parish, in such manner, that the advice of their faithful, laborious, and disinterested spiritual guide shall, upon all occasions, be acceptable to them.

3 *id*.

131. 3 *id*. at 202–03.

132. HAY, *supra* note 115, at 105.

founding fathers" were familiar with the work.[133] Historians Oscar and Mary Handlin suggest that the work had "widespread influence upon the revolutionary generation—not only upon the leaders, but even more upon the common folk."[134] The list of "encouragers," who in 1775 supported reprinting *Disquisitions* in Philadelphia, includes George Washington, Samuel Chase, John Dickinson, Silas Deane, Christopher Gadsen, John Hancock, Thomas Jefferson, Thomas Mifflin, George Ross, Roger Sherman, John Sullivan, Charles Thomason, and James Wilson.[135] Concerning John Adams' early enthusiasm for, but later reservations in, the publication, Hay explains that Adams' retreat was the proclivity of *Disquisitions* to swing the masses too far, in the founder's view, in favor of democracy.[136]

4. Isaac Backus

The life of Isaac Backus (1724–1806) is a story of perseverance in the face of unyielding opposition. While he won no lasting victories, his tireless efforts in opposing the Congregational establishment in Massachusetts eroded the foundation supporting the Standing Order. The nearly imperceptible momentum gained through Backus' lobbying, writing, and speaking ultimately cleared the way for disestablishment, which finally came in 1832 to 1833.[137]

133. *Id*.

134. OSCAR HANDLIN & MARY HANDLIN, *James Burgh and American Revolutionary Theory*, 73 PROC. MASS. HIST. SOC'Y, Jan.–Dec. 1961, at 38. They continue: "Its phrases were familiar in the town meetings of western Massachusetts, for instance, for they seemed not only to make comprehensible and to justify the colonists' stand against England, but also to explain, so that any ordinary man could understand, the relation of the individual to government." *Id*.

135. *Id*. at 51.

136. HAY, *supra* note 115, at 44. Hay's discussion of Adams' change of heart includes the following:

> In 1744 Adams had described the Disquisitions as the "best service that a citizen could render to his country at this great and dangerous crisis, when the British Empire seems ripe for destruction, and tottering on the brink of a precipice." By 1789 the growth of antifederal sentiment led Adams to qualify his judgment.

Id. Hay then quotes a letter from Adams to Price in which he frets about the excess of republicanism encouraged by Burgh's work. She notes, "Adams' judgment is telling evidence of the *Disquisitions'* influence during the formative years of the American republic." *Id*.

137. Backus' vision for church-state relations has been described in STANLEY GRENZ, ISAAC BACKUS—PURITAN AND BAPTIST: HIS PLACE IN HISTORY, HIS THOUGHT, AND THEIR IMPLICATIONS FOR MODERN BAPTIST THEOLOGY (1983), as follows:

> [T]he church by definition could acknowledge no head but Christ. . . . Since Christ alone is Lord of the Church, any human laws regulating the church and any

a. Pre-Revolution dissent. Backus was born into a wealthy farming family in Norwich, Connecticut. Baptized in the Congregational Church as an infant, he grew up on Calvinistic teaching. His pilgrimage from yeoman farmer to activist clergyman is attributable to the First Great Awakening and the effect it had on his family and his early experience of religion. The sincerity of his conviction is evident in two transitions he made on the basis of theological conviction. Embracing the "new light" teachings of the Awakening, he left the Congregational Church to join the Congregational Separates. Then, rejecting the practice of infant baptism, he later left the Separates to join the Baptists.[138]

The Baptists opened Rhode Island College (later Brown University) in 1764 with James Manning as president.[139] However, it was another project of Manning's that would prove the most beneficial to Baptists in their struggle with the New England Standing Order. Manning called a meeting in September of 1767 in Warren, Rhode Island, to form the Warren Baptist Association.

> alteration of the laws given in the New Testament is a usurpation of Christ's prerogative. . . .

Id. at 328.

> Backus accused the Standing Order, because of the church/state establishment, of refusing in practice to give Christ his proper place as sole ruler in his Kingdom, which is his church. The Middleboro minister looked for the day when the two spheres would be adequately separated and Christ would again be allowed to rule his church as its king, an event which would usher in an era of peace and righteousness.

Id. at 263.

> On the basis of this theological system, Backus began . . . his struggle to put into practice the church/state theory which he saw as following from it, namely his concept of the two spheres in sweet harmony with each other. The Middleboro minister envisioned a land in which the magistrates fulfilled their position as God's servants, sent not to make laws which violated Christ's authority or men's consciences but merely to create a healthy climate in which Christianity was free to spread, and in which the church never called on the magistrates to punish those who violated spiritual laws, but rather trusted truth to prevail by means of spiritual weapons and then molded society as God, through the gospel proclamation, converted its members individually.

Id. at 328.

> [When there is] a sweet harmony between church and state: the state provides a climate which is favorable to the spread of truth, i.e. one in which individual consciences are left free to be convinced by the divine truth (i.e. gospel truth) . . . in order that they might be converted and thereby become truly good citizens.

Id. at 309.

138. *See* WILLIAM G. MCLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION 1–22, 57–88 (1967).

139. *Id.* at 101–03.

Backus attended that meeting but had reservations about the potential harm such an association could bring to the Separate Baptist movement. After debate and some modification in the Association's charter, Backus lent his support to the group and was instrumental in convincing many Baptist churches to join.[140]

Important to Backus' future was the creation of the Grievance Committee within the Warren Association. In response to a letter from a Baptist congregation in Ashfield, Massachusetts, the Association voted to create a committee that would receive reports of persecution of Baptists in New England and coordinate lobbying and informational efforts.[141] John Davis (the soon-to-be pastor of the Second Baptist Church in Boston) was named chairman, and Isaac Backus was installed as a member of the committee.[142]

The Committee's first task was to challenge the "Ashfield Law" of 1768, which entailed a system of certificates to assure that an individual was attending a religious congregation.[143] The law required all inhabitants of Ashfield to support the Congregational Church in spite of statutory exemptions granted years earlier to Quakers, Baptists, and Anglicans.[144] The Baptists of Ashfield had petitioned the General Assembly for relief and had been denied in 1769 and again in 1770.[145] With the Ashfield Law still firmly in place, the Committee petitioned King George III for relief. On July 31, 1771, the king disallowed the Ashfield Law.[146] Throughout this effort, Backus stood out as the most ardent member of the Committee, a fact that was to bring him more public attention.[147]

140. *Id*. at 105–07.

141. *Id*. at 10–12.

142. ALVAH HOVEY, A MEMOIR OF THE LIFE AND TIMES OF THE REV. ISAAC BACKUS 173–76 (Da Capo Press 1972) (1859).

143. The New England "certificate system" was a method of tax exemption for Anglicans, Quakers, and Baptists. To the Puritan mind, the "settled minister" served everyone in the community whether or not they regularly attended his services. The certificates were a way to verify that an individual was indeed regularly attending a different congregation, thus accomplishing the result intended by the legislators. This system was developed primarily for the sake of the Anglicans whose clergy were considered by the Congregationalists both orthodox and learned. The Baptists, however, had theological objections to this arrangement. For them to admit that the state had any right to demand either tax or certificate was a violation of conscience. *See* MCLOUGHLIN, *supra* note 138, at 112–17.

144. *Id*. at 112, 116.

145. *Id*. at 116–17.

146. *Id*. at 118.

147. *Id*. at 118–19.

Backus was soon named "agent" for the Baptists in New England by the Association and chairman of the Committee.[148]

The royal veto of the Ashfield Law did not stop assessors and collectors from finding a variety of excuses for disallowing Baptists the exemption from religious assessment or simply ignoring the exemption law altogether.[149] By 1773, Backus and the Committee had given up on legal process and adopted a position of civil disobedience.[150] To explain this new tactic to the Baptists in the Association and the public at large, Backus wrote, and the Committee published, *An Appeal to the Public*.[151] This pamphlet was a "Declaration of Independence" for the Baptists and, while not having its immediate desired effect, did influence public opinion enough to cause modifications to the establishment in the 1780 Massachusetts Constitution.[152]

In this 1773 pamphlet, Backus declines to build upon Locke's social contract theory and inalienable rights, preferring a fully biblical vision of "true government" as being limited not by consent withheld, but by God.[153] While human laws are necessary for the maintenance of a civil society, "in ecclesiastical affairs we are most solemnly warned not to be *subject to ordinances after the doctrines and commandments of men*."[154] The question, according to Backus, is one of jurisdiction. Whereas social contract theory maintains that people in a state of nature do not (indeed, cannot) consent to human government taking jurisdiction in religious affairs, Backus asserts that the limit on the jurisdiction of government comes straight from God.[155] He outlines the dangers of state involvement in

148. HOVEY, *supra* note 142, at 188.

149. MCLOUGHLIN, *supra* note 138, at 119–20.

150. DAVID B. FORD, NEW ENGLAND'S STRUGGLES FOR RELIGIOUS LIBERTY 181–83 (1896).

151. *Id*. at 184–85.

152. WILLIAM G. MCLOUGHLIN, ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: MCLOUGHLIN, 1754–1789, at 305 (1968).

153. ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *reprinted in* MCLOUGHLIN, *supra* note 152, at 309. Backus acknowledges the Western concept of dual authorities as follows: "[I]t is needful to observe that God has appointed two kinds of government in the world which are distinct in their nature and ought never to be confounded together, one of which is called civil [and] the other ecclesiastical government." *Id*. at 312.

154. MCLOUGHLIN, *supra* note 152, at 313.

155. *Id*. at 313–14. Backus argues four points which are excerpted below:

ecclesiastical affairs from Constantine I to the American colonies.[156] In answering John Cotton's explanation for colonial enforcement of orthodoxy, Backus quotes Roger Williams, founder of Rhode Island, in defense of disestablishment.[157] Backus makes his case for voluntaryism by pointing out that coercive force begets hypocrites rather than genuine believers, and that the King of kings has no need of New England magistrates to maintain and preserve His kingdom.[158] To great effect, Backus closes the essay by analogizing the Baptist claim for relief from religious assessment to that of the colonists complaining about English taxation.[159]

> 1. The forming of the constitution and appointment of the particular orders and offices of civil government is left to human discretion, and our submission thereto is required under the name of their being the *ordinances of men* for the Lord's sake, 1 *Pet.* ii, 13, 14. Whereas in ecclesiastical affairs we are most solemnly warned not to be *subject to ordinances after the doctrines and commandments of men*, *Col.* ii, 20, 22. And it is evident that He who is the only worthy object of worship has always claimed it as his sole prerogative to determine by express laws what his worship shall be, who shall minister in it, and how they shall be supported. . . .
>
> 2. That as the putting any men into civil office is of men, of the people of the world, so officers have truly no more authority than the people give them. And how came the people of the world by any ecclesiastical power? . . .
>
> 3. All acts of executive power in the civil state are to be performed in the name of the king or state they belong to, while all our religious acts are to be done in the *name of the Lord Jesus* and so are to be performed *heartily as to the Lord and not unto men*. . . .
>
> 4. In all civil governments some are appointed to judge for others and have power to compel others to submit to their judgment, but our Lord has most plainly forbidden us either to assume or submit to any such thing in religion, *Matt.* xxiii, 1–9; *Luke* xxii, 25–27.

Id.

156. *Id.* at 315–16. Backus' survey compares and contrasts the following: Constantine's favor gave way to Julian's persecution; the pope's domination over kingdoms gave way to Henry VIII's domination over the church; the English establishment forced dissenters to flee to America where the former dissenters in turn began persecuting dissenters from their new form of establishment. He concludes this line of thought by stating that Massachusetts lost its first charter (to Charles II) because the church attempted to dominate the government, and since that unfortunate occasion New England has allowed the government to rule over the church.

157. *Id.* at 322. Backus quotes Roger Williams as saying, "The practicing civil force upon the consciences of men is so far from preserving religion pure that it is a mighty bulwark or barricado to keep out all true religion. . . ." *Id.*

158. *Id.* at 314–41. "This is the nature of his *Kingdom* which he says *Is not of this world*, and gives that as the reason why his servants should not *fight* or defend him with the *sword* . . . ." *Id.* at 315. "And after they had acted upon this law one of their chief magistrates observed, that such methods tended to make hypocrites." *Id.* at 324. "*Violences* may bring the erroneous to be hypocrites, but they will never bring them to be believers." *Id.* at 341.

159. *Id.* at 340.

An Appeal to the Public proved to be the foundation upon which Backus would build the remainder of his siege engine to weaken (and eventually topple) the establishment in Massachusetts.[160] Backus premised his arguments on individual free exercise of religion, lack of state jurisdiction over the church, and the disturbance of the peace caused by governmental power applied to matters of religion.[161] Elsewhere he would take aim at the requirement for a "learned clergy" via cleric licensor laws by pointing out the tendency of government support to corrupt rather than assist ministers of the gospel.[162]

b. New England Baptists and the Revolution. Backus' pamphlet writing took a five-year hiatus during the Revolution. Parliament answered the Boston Tea Party at the close of 1773 with the Coercive Acts of 1774, which, combined with the Quebec Act[163] and the Quartering Act, prompted the colonists to convene a Continental Congress in September of 1774.[164] The Baptists saw an opportunity in the Congress to appeal to an authority higher than

> And as the present contest between Great Britain and America is not so much about the greatness of the taxes already laid, as about a submission to their taxing power, so (though what we have already suffered is far from being a trifle, yet) our greatest difficulty at present concerns the submitting to a taxing power in ecclesiastical affairs.

Id.

160. MCLOUGHLIN, *supra* note 138, at 123. McLoughlin says of the piece, "It remains the best exposition of the eighteenth century pietistic concept of separation." *Id*.

161. The first three sections of the tract have subheadings that read: "Some essential points of difference between civil and ecclesiastical government," "A brief view of how civil and ecclesiastical affairs are blended together among us to the depriving of many of God's people of that liberty of conscience which he has given them," and "A brief account of what the Baptists have suffered under this constitution and of their reasons for refusing any active compliance with it." ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *reprinted in* MCLOUGHLIN, *supra* note 152, at 313, 316, 325.

162. *See* MCLOUGHLIN, *supra* note 138, at 41–42. Backus, like most "new lights," believed that a "converted clergy" was to be preferred over a "learned clergy." His devout Calvinism revolted at the thought of an unregenerate pastor tending the flock of Christ. MCLOUGHLIN, *supra* note 152, at 28. In later years, James Manning would have some success in convincing Backus that a "converted AND learned clergy" was to be preferred to either of the other categories.

163. The Quebec Act accepted Quebec's Catholic establishment. This caused American colonialists to protest to George III in *The Declaration of Rights*, adopted by the First Continental Congress on October 14, 1774. *See infra* notes 226–30, and accompanying text.

164. MCLOUGHLIN, *supra* note 138, at 128.

the Massachusetts General Assembly without going to the king.[165] The Warren Association sent Backus, Manning, and Chileab Smith to Philadelphia to plead the Association's case.[166] Upon arrival a local Baptist lawyer introduced the group to two Quakers who offered to serve as consultants and supporters.[167] This plan backfired because of the loyalist tendencies of the Quakers. When certain delegates, including Samuel Adams, John Adams, and Robert Treat Paine, saw the Baptists in the company of Quakers, an accusation was made against the Baptists' patriotism. This was a cloud that would hang over the movement throughout the war.[168] It was at this meeting that John Adams quipped to Backus that "we might as well expect a change in the solar system, as to expect [that New Englanders] would give up their establishment."[169] The meeting accomplished little, and the Baptist delegation resigned themselves to distributing copies of *An Appeal to the Public* to each delegate.[170]

After returning home, the Grievance Committee got back to work by sending a petition to the Massachusetts Provisional Congress in December of 1774. The petition defended Baptist patriotism and cited recent persecution in several towns. Specifically, the Baptists wanted the public to know that their trip to Philadelphia had been for the purpose of securing religious freedom and not to undermine that important proceeding. In a reply to Backus, the state Provincial Congress dissembled saying it regretted it was unable to give the Baptists satisfaction. When military fighting broke out at Lexington-Concord in April of 1775, the Baptists wholeheartedly joined the patriot cause while never abandoning their hope of disestablishment.[171]

165. *Id*.

166. *Id*. at 129. Chileab Smith served as "a living witness to the worst persecution of the sect." *Id*.

167. HOVEY, *supra* note 142, at 203.

168. MCLOUGHLIN, *supra* note 138, at 130. As late as the 1780 Massachusetts Constitutional Convention, Robert Treat Paine was still accusing the Baptists of treachery and treason. *Id*. at 133.

169. HOVEY, *supra* note 142, at 212.

170. *Id*.

171. MCLOUGHLIN, *supra* note 138, at 133–35. Backus wrote in 1784, "While the defence of the civil rights of America appeared a matter of great importance, our religious liberties were by no means to be neglected; and the contest concerning each kept a pretty even pace throughout the war." *Id*. at 135.

Backus viewed the Revolution as a providential step toward the overthrow of the Congregational establishment.[172] He sent a petition to the Massachusetts General Assembly in September of 1775, similar to the one sent to the First Continental Congress a year earlier. The General Assembly appointed a committee comprised of three Baptists and four Congregationalists who could not come to an agreement as to the appropriate language, so Asaph Fletcher, a Baptist legislator, introduced a bill of his own. However, the business of war so preoccupied the Assembly that it never brought the bill to a vote.[173]

c. The first Massachusetts constitution. In May of 1776, the Second Continental Congress called for the drafting of constitutions by each of the colonies.[174] Massachusetts made its first attempt in 1777 and a year later submitted a proposed constitution to the people for ratification. While the Baptists were opposed to the provisions for establishment, other defects in the draft caused the document to be returned to the Assembly.[175]

In his election sermon in May of 1778, Phillips Payson, a Congregational minister, directly attacked the Baptists and their efforts to encourage disestablishment. Payson's theological liberalism and social conservatism led him to see the Baptists as fanatics who were threatening the unity of New England society.[176] In response to this assault, in October of 1778 the Warren Association published Backus' *Government and Liberty Described*.[177]

The genius of this pamphlet lies in the parallel it draws between Payson's election sermon and another prominent Congregational clergyman's argument against an Anglican bishopric in the colonies.

172. *Id.* at 137. The ensuing war had a limited direct impact on Backus. McLoughlin says, "He preached once or twice to the troops encamped around Boston. His eldest son served in the Connecticut militia, and his brother's ironworks in Yantic supplied military and naval hardware. . . . But no one in his family was killed or injured in the war." *Id.*

173. FORD, *supra* note 150, at 219–20.

174. Of the original states, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia adopted constitutions in 1776. Georgia and New York did so in 1777. Connecticut kept its original charter until it was replaced in 1818. Finally, the original charter granted to Rhode Island was tacitly adopted as its constitution and remained so until replaced in 1842. *See infra* Part III.B–D.

175. MCLOUGHLIN, *supra* note 138, at 138–39.

176. MCLOUGHLIN, *supra* note 152, at 346.

177. FORD, *supra* note 150, at 223; MCLOUGHLIN, *supra* note 152, at 346.

Rev. Charles Chauncy had written in opposition (as a matter of religious freedom) to the formation of a bishopric of the Church of England in New England, but he was now in Payson's corner opposing the Baptists.[178] Backus deftly appropriated Chauncy's logic against Payson's defense of the Congregational establishment.[179] He continued by asserting the patriot's cry "no taxation without representation" and by applying it to the Baptists' plea against religious taxation.[180] Backus also attacked Payson's premise that disestablishment would bring civil disintegration by pointing to the example of Boston, which had repealed religious taxes eighty-five years before.[181]

In May of 1779, possibly in response to this tract, the General Assembly asked Samuel Stillman, a Baptist minister, to deliver the election sermon. His address, coauthored by Backus, argued both from Backus' biblical foundation and Locke's *A Letter Concerning*

178. ISAAC BACKUS, GOVERNMENT AND LIBERTY DESCRIBED (1778), *reprinted in* MCLOUGHLIN, *supra* note 152, at 346–48.

179. *Id*. at 351–55. A good example of this weaving of arguments follows:

> And to defend it against the bishops the first of these gentlemen says, "It does not appear to us that God has entrusted the state with a right to make religious establishments." The other warns our civil rulers against suffering any changes in their "established modes and usages in religion." The first declares that such establishments have *in fact* been of *infinite damage to the cause of God and true religion, in all ages, and in all places*. The other says, "The thoughtful and wise among us, trust that our *civil fathers*, from a regard to Gospel worship, and the *constitution of these churches*, will carefully *preserve them*; and at all times, guard against every innovation, that might tend to *overset* the public *worship of God*."

Id. at 354.

180. *Id*. at 357. Backus compares claims saying:

> I need not inform you that all America are in arms against being taxed where they are not represented. But it is not more certain that we are not represented in the British Parliament than it is, that our *civil* rulers are not our representatives in *religious* affairs. Yet ministers have long prevailed with them to impose religious taxes entirely out of their jurisdiction.

Id.

181. *Id*. Backus argues by extension that since religious pluralism does not produce conflict in society, there is no need for the argument that civil force is necessary to prevent it. He goes on to point out:

> But since the Baptists worship a Savior who always has had the most powerful party and since he has taught them that the reason why he forbid the use of force in religion is because his kingdom is *not of this world*, they expect, according to his word, to overcome all their accusers by the *blood of the Lamb and by the word of their testimony*, and think it their duty to attend upon the use of those means for that end.

Id. at 365.

Toleration. Three weeks later the General Assembly called for a state constitutional convention, which would convene later that year in September. Backus and the Baptists braced themselves for another fight.[182]

On August 13, 1779, in anticipation of the September convention, Backus published *Policy as Well as Honesty* to persuade delegates to support the Baptist cause and to answer attacks that had been made against his *Government and Liberty Described*.[183] This new tract sparked a war of letters, which were published in the newspapers under pen names, both supporting and challenging Backus' arguments.[184]

Policy as Well as Honesty revisited the material covered in Stillman's election sermon. Backus argued his usual biblical grounds for disestablishment but, with an eye to a broader appeal, he added arguments from Locke.[185] He also quoted an election sermon from 1773 delivered in Hartford, Connecticut,[186] and returned to Chauncy's arguments against an Anglican bishopric in New England.[187] He closed with an interesting comparison of one's

182. MCLOUGHLIN, *supra* note 138, at 141–42.

183. MCLOUGHLIN, *supra* note 152, at 368.

184. "Milton" (Samuel Stillman) and "Philanthropos" (a "new light" Congregationalist) offered supportive reasons to counter the opposition of "Hieronymous" (Robert Treat Paine?) and "Irenaeus" (Samuel West). *Id*. at 368–69.

185. *Id*. at 376–77. Backus quotes Locke as saying:

> A church is a free and voluntary society. Nobody is born a member of any church, otherwise the religion of parents would descend unto children by the same right of inheritance as their temporal estates, and everyone would hold his faith by the same tenure he does his lands, than which nothing can be imagined more absurd.

Id. at 376.

186. *Id*. at 379. The sermon delivered on May 13, 1773, by Mr. Wetmore says:

> The affairs of the state are the proper province of civil rulers; as to the Church of Christ, be content to let it stand upon its own proper Gospel foundation, regulated by its own laws, and guarded and enforced by its own sanctions. On this foundation she has stood in her best days; on this foundation she can yet stand, and must stand and live forever. And though she may appear weak and feeble and ready to fall, yet the interposition of worldly power to establish her, and civil policy to defend her will only jostle her foundations, and sink her the lower.

Id.

187. *Id*. at 380–81. Backus cites Chauncy as saying:

> The religion of Jesus has suffered more from the exercise of this pretended right than from all other causes put together, and it is with me past all doubt that it will never be restored to its primitive purity, simplicity, and glory until religious establishments are so brought down as TO BE NO MORE.

Id.

freedom in choosing a lawyer or doctor to one's lack of freedom in choosing a clergyman.[188]

Prior to the convention, Noah Alden asked his friend Backus for his opinion concerning a bill of rights for the new constitution.[189] Backus replied with thirteen proposed points, the second of which reads:

> As God is the only worthy object of all religious worship, and nothing can be true religion but a voluntary obedience unto his revealed will, of which each rational soul has an equal right to judge for itself; every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby. And civil rulers are so far from having any right to empower any person or persons to judge for others in such affairs, and to enforce their judgements with the sword, that their power ought to be exerted to protect all persons and societies, within their jurisdiction, from being injured or interrupted in the free enjoyment of this right, under any pretence whatsoever.[190]

Although outnumbered and often slandered, the Baptists won some sympathetic ears among the delegates.[191] The convention even appointed Alden chairman of the committee on ecclesiastical affairs, although his Baptist views would not prevail.[192]

The convention's draft constitution that was presented to the people for ratification in 1780 had two articles relevant to the

188. *Id.* at 381. In Backus' words:

> Men have three things to be concerned for, namely, soul, body, and estate. The two latter belong to the magistrate's jurisdiction, the other does not. There is a learned profession suited to each of these interests, yet every man and every woman have long been allowed that liberty about physicians and lawyers that has been denied them about soul guides. And can my dear countrymen any longer suffer officers to do that out of their province which they dare not do in it!

Id.

189. MCLOUGHLIN, *supra* note 138, at 143.

190. *Id.*

191. *Id.* at 142 ("Although only five of the 293 delegates to the convention are known to have been Baptists, many others were sympathetic to their ideas of religious liberty."). Concerning slander, Backus records being informed by delegates that "mr. John Adams and mr. Paine gave the convention a false [account] of the affair of my going to Philadelphia which had some influence toward procuring [the] article . . . ." *Id.* at 144.

192. FORD, *supra* note 150, at 226. Concerning Alden, Ford writes that "without [his] labors and influence the Third Article would probably have been far more objectionable than it is." *Id.* at 229.

religion question. Article Two, drafted by the establishmentarian John Adams, raised no objection from the dissenters.[193] Article Three, however, would prove to be a source of controversy for many years.

Article Three, as proposed, eliminated the exemption from the religious tax for support of the established church, while insinuating that each person's tax would be remitted to the church to which that person belonged. To proponents of the Article, this was a material departure and a step forward from the old certification/exemption system. To Backus and the Baptists, this was a step backward in that the state still claimed the power to levy religious taxes. Of particular concern was the lack of a mechanism by which the assessor could ascertain whose taxes went to what church. Fearing Article Three to be worse than the system already in place, on April 6, 1780, Backus wrote and distributed *An Appeal to the People* in an effort to prevent its ratification.[194]

The convention had decided that each article in the proposed constitution had to receive a two-thirds vote to be ratified. Any article not receiving the required vote would be amended and resubmitted for another vote. As the convention counted the returns, it appeared that Article Three had received only fifty-nine percent approval. Some of the precincts recommended total rejection while others suggested modifications. The convention decided to

193. MCLOUGHLIN, *supra* note 138, at 146. This article reads:

> It is the right as well as the duty of all men in society, publicly and at stated seasons to worship the SUPREME BIENG, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained in his person, liberty or estate, for worshiping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Id.

194. MCLOUGHLIN, *supra* note 152, at 387. This tract reiterates Backus' platform but also offers the following new and interesting argument against establishment:

> And since it is certain that Christianity was founded upon *the truth* and that the *power of it* conquered the Roman Empire do they not deny the power of it who hold that it would soon be lost from among us if *force* was not used to support it? I concur with them that religion has been the life of New England. But I am so far from thinking that human laws about religious worship have been our life that I know they have been most deadly things to us, and that if the power of Godliness had not been above them and had not prevailed against them, we should all have been ruined long ago.

ISAAC BACKUS, AN APPEAL TO THE PEOPLE (1780), *reprinted in* MCLOUGHLIN, *supra* note 152, at 394.

count only those returns that fully rejected Article Three, thus gaining the required super-majority.[195]

d. Mixed signals from the courts. Disappointed by his failure to block ratification but encouraged by the closeness of the vote, in April of 1781 Backus published *Truth Is Great and Will Prevail,* which voiced continued Baptist opposition to Article Three and answered attacks.[196] The most notable points made in this rambling pamphlet involve Backus' newfound and tentative toleration of Catholics[197] and the beginning of a wedge between Unitarians (a movement amongst the Congregationalists) and the increasingly evangelical Trinitarians within the same church.[198]

With establishment embedded in the new constitution, continued lobbying was pointless. The Baptists returned to their tactic of civil disobedience, hoping for some relief in the courts. In 1781, a slave named Quok Walker had successfully sued his master for freedom on the ground that the new state constitution declared

195. MCLOUGHLIN, *supra* note 138, at 156–57.

196. MCLOUGHLIN, *supra* note 152, at 398. Backus also gives a detailed explanation for why the Baptists had chosen civil disobedience on the certificate issue. He says:

> This, with other means, brought the Warren Association in the fall after to publish these five reasons why we could not in conscience obey their certificate laws any longer: 1. Because so to do would imply an acknowledgment that civil rulers have a right to set one religious sect up above another, which they have not. 2. Because they are not our representatives in religious matters, therefore so to tax us is to tax us where we are not represented. 3. Because this practice emboldens the uppermost sect to assume God's prerogative and to judge the secrets of others hearts. 4. Because the church is presented as a *chaste virgin to Christ* and to place her love and trust upon any others for temporal support is *playing the harlot, Hos.* ii, 5, and so is the way to destroy all religion. 5. Because this practice tends to *envy, hypocrisy, confusion, and every evil work* and so to the ruin of human society.

ISAAC BACKUS, TRUTH IS GREAT AND WILL PREVAIL, *reprinted in* MCLOUGHLIN, *supra* note 152, at 420–21.

197. *See id.* at 422. Backus cites Roger Williams with approval, saying:

> The first founder of the town and colony of Providence Plantations, [Roger Williams] had a plain sight of the deceitfulness of such claims and contended earnestly for *impartial liberty* for the consciences of Papists with others as to matters of worship, so far as might be consistent with the safety of government and the rights of individuals and that none but spiritual weapons should be employed against mere errors in judgement of any kind.

Id.

198. *Id.* at 399–400, 423. Backus appeals to Trinitarian Congregationalists to not support Unitarians saying, "Therefore let no man ever again attempt to deceive others or give his vote for any who evidently do so as he would escape such a shipwreck himself and also the guilt of endangering the community he belongs to thereby." *Id.* at 422–23 n.*.

that all men are born free and equal.[199] The Baptists reasoned that if the court was willing to extend the constitution to slavery and property laws, it might be willing to overturn Article Three. The Baptists soon had an opportunity to try out their argument.

In Attleborough, Massachusetts, Baptists had refused to turn in certificates or pay the religious tax.[200] While several of their members had property seized and sold to pay the tax, Elijah Balkcom was arrested and carried off toward the jail. At the last moment and while under duress, Balkcom paid the tax, but he then initiated a lawsuit in the county court against the assessors.[201] Balkcom's theory of the case was that Article Three was internally inconsistent since it required religious taxation but also promised that no denomination would be subordinated to another. While Baptists and other dissenters had to give certificates to have the tax remitted to their church, Congregationalists did not.[202] The county court found this argument persuasive and awarded damages and costs to Balkcom.[203]

This victory, after so many defeats, prompted Backus to write *A Door Opened for Equal Christian Liberty*. In this pamphlet, Backus pointed out the illogic of supposing any authority in religious affairs to be vested in government by means of social contract or consent.[204]

199. MCLOUGHLIN, *supra* note 138, at 158.

200. *See* William G. McLoughlin, *The* Balkcom *Case (1782) and the Pietistic Theory of Separation of Church and State*, 24 WM. & MARY Q. 267, 270–71 (1967).

201. MCLOUGHLIN, *supra* note 138, at 158–59. Robert Treat Paine, then attorney general of the state, personally defended the assessors. McLoughlin, *supra* note 200, at 274. "The fact that Paine had taken charge of the case for the parish indicates the importance which he and the defenders of the establishment gave to it." *Id*. at 274–75.

202. McLoughlin, *supra* note 200, at 271. McLoughlin says:

> In the case which followed, Balkcom urged as his defense that it was unconstitutional for the Baptists to be forced to give certificates either to be exempted from religious taxes or to have their taxes paid over to their own church because Article Three stated that no one sect should ever be subordinated to any other. If he won this point, he would effectively undermine the intent of Article Three and the plan of religious taxation which the Congregationalists thought was secured by it.

Id.

203. *Id*. at 274. Backus' diary records that "after a fair and full hearing the judges unanimously gave Balkcom damages and costs of court; which is a great step towards putting an end to that controversy, and calls for our unfeigned and hearty praises." *Id*.

204. ISAAC BACKUS, A DOOR OPENED FOR CHRISTIAN LIBERTY (1783), *reprinted in* MCLOUGHLIN, *supra* note 152, at 436. Backus writes:

> Not only America but all the kingdoms and states of Europe who have acknowledged the authority of our Congress have set their seal to this truth, that the highest civil rulers derive their power from the consent of the people and cannot

He also sketched in bold strokes his position on voluntaryism.[205] He closed by pointing out that the government must disestablish religion if the people are to be successful in their "pursuit of happiness."[206]

The euphoria was short-lived. In 1784, just two years after the *Balkcom* case, Gershom Cutter of Cambridge was imprisoned for failing to pay his religious taxes, and he subsequently sued the assessors.[207] Based on the *Balkcom* precedent, Cutter prevailed in the county court. The assessors appealed to the Superior Court where the decision below was reversed.[208] The result was a disaster for the Baptists.[209] The Superior Court said that only congregations that

> stand without their support. And common people know that nothing is more contrary to the rules of honesty than for some to attempt to convey to others things which they have no right to themselves, and no one has any right to judge for others in religious affairs.

Id.

205. *Id*. at 437–38. Invigorated by the *Balkcom* decision, Backus proclaims:

> For the name Protestant is no longer to be a test of our legislators, and to persuade the people to yield thereto the compilers of the constitution said to them, "your delegates did not conceive themselves to be vested with power to set up one denomination of Christians above another, for religion must at all times be a matter between God and individuals." This is a great truth, and it proves that no man can become a member of a truly religious society without his own consent and also that no corporation that is not a religious society can have a right to govern in religious matters.

Id. at 437.

> Christianity is a voluntary obedience to God's revealed will, and everything of a contrary nature is antichristianism. And all teachers who do not watch for souls as those who must give an account to God, and all people who do not receive and support his faithful ministers as they have opportunity and ability are daily exposed to punishments infinitely worse than men can inflict.

Id. at 438.

206. *Id*. at 438. Backus, echoing the Declaration of Independence, defines the object of civil government as follows:

> Reason and revelation agree in determining that the end of civil government is the *good* of the governed by defending them against all such as would work *ill to their neighbors* and in limiting the *power* of rulers there. And those who invade the religious rights of others are *self-condemned*, which of all things is the most opposite to *happiness*, the great end of government.

Id.

207. *See* McLoughlin, *supra* note 200, at 278–79.

208. *Id*. at 278.

209. It is worth noting that, while favoring establishment, this decision fully acknowledges the dual-authority construct of individual and state and church and state. *See supra* text accompanying note 1. The *Cutter* decision views Article Two as pertaining to the

were incorporated by the state would be recognized by the law.[210] A dissenting church would thus be forced to petition the legislature to incorporate, thereby implicitly conceding the legislature's authority over the church. This the Baptists could not do in good conscience.[211] While the *Cutter* opinion was as reactionary as the *Balkcom* decision had been radical, the certificate system survived in one form or another until disestablishment was accomplished by constitutional amendment in 1833.[212]

Backus' *Address to the Inhabitants of New England*, published in 1787, was his final major effort on church-state relations.[213] In it he addressed the government's response to Shay's Rebellion. More importantly, he beseeched his fellow citizens one last time to allow their neighbors the freedom of personal judgment in religious

relationship between the state and the individual believer, while Article Three governs the relationship between the state and the various churches.

210. *Id.* ("But the most crushing part of this decision was its ruling that no religious society or congregation could be entitled to legal recognition unless it was incorporated by act of the legislature.").

211. MCLOUGHLIN, *supra* note 138, at 162–63. McLoughlin describes the predicament now facing the Baptists saying:

> It also denied any way for the Baptists to avoid supporting the parish churches except by petitioning the legislature for incorporation. And such a petition was an even more flagrant infringement of conscience than giving in certificates; it acknowledged the power of the State over the Church—the power to incorporate some and not others according to its own standards.

Id.

212. In spite of the fact that establishment survived in Massachusetts longer than in any other state, McLoughlin makes the following observations concerning the narrowness of the establishmentarian victories:

> It was possible that the failure of Article Three to receive the necessary two-thirds vote for ratification in 1780 might have forced a reconsideration of the whole nature of the religious establishment in New England. It was possible that the Balkcom Case in 1782 might have set a precedent for voluntarism. Both incidents confirm the fact that the issue was much more uncertain than a superficial study of the mainstream of events implies.

McLoughlin, *supra* note 200, at 279.

213. Backus moved on to attend to doctrinal disputes with only occasional attention to activities on behalf of the Grievance Committee. He was a delegate in 1788 to the Massachusetts convention to consider ratification of the federal Constitution. Notwithstanding some initial reservations, Backus was persuaded to vote in favor of ratification. MCLOUGHLIN, *supra* note 138, at 196–200. The next year Backus traveled to Virginia to meet with fellow Baptists concerning church affairs. The Virginia Baptists queried Backus concerning the adequacy of the Constitution proper on the matter of religious freedom, and he responded with assurances. Letter from James Manning to James Madison (Aug. 29, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 366 (Charles F. Hobson & Robert A. Rutland eds., 1979).

matters.[214] Backus' tract is full of references to scripture and is a good example of arguing from a theological position in an effort to persuade the populace toward the adoption of a public law.

The story of disestablishment in New England is a dramatic account of glacial change against seemingly insurmountable odds. In Massachusetts the steady pull of gravity necessary to wear down the Standing Order was provided by Backus, his fellow Baptists, and, in time, Methodists.[215] They were reviled and suffered public ridicule. But by persistently and consistently restating and defending Baptist arguments, while tirelessly joining each new battle as it emerged, Backus and like-minded Protestants provided both the rationale for defeating establishment and the principles, both biblical and Lockean, upon which to build a society of religious voluntaryism.

III. DISESTABLISHMENT: THE AMERICAN SETTLEMENT UNFOLDS

A. The Context for Disestablishment (1774–1833)

Disestablishment did not come abruptly as a consequence of the Revolutionary War[216] and the ensuing formation of constitutional

214. ISAAC BACKUS, AN ADDRESS TO THE INHABITANTS OF NEW ENGLAND (1787), *reprinted in* MCLOUGHLIN, *supra* note 152, at 443. Backus urges:

> Our fathers came to this land for purity and liberty in their worship of God, but how many have drawn their swords against each other about the affairs of worldly gain, whereby an exceeding dark cloud is brought over us. Instead of being the light of the world and the pillar and ground of the truth, as those are that obey Him who is the fountain of *light* and *love*, what a stumbling-block are we to other nations, who have their eyes fixed upon us?

Id.

215. *See* GEORGE CLAUDE BAKER, JR., AN INTRODUCTION TO THE HISTORY OF EARLY NEW ENGLAND METHODISM, 1789–1839, at 42–49 (1941) (summarizing Methodist efforts on behalf of disestablishment in Massachusetts, Connecticut, and Vermont).

216. PHILIP SCHAFF, AMERICA: A SKETCH OF ITS POLITICAL, SOCIAL, AND RELIGIOUS CHARACTER 74 (Perry Miller ed., Harvard Univ. Press 1961) (1855) ("This separation was by no means a sudden, abrupt event, occasioned, say, by the Revolution. . . . The last traces of this state-church system in New England were not obliterated till long after the American Revolution, . . . [and] the separation of the temporal and spiritual powers is by no means absolute."). The French and others on the European continent thought that the American disestablishment was brought about by the American Revolution because that was the experience in France and its Revolution. *Id.* at 74–76.

While disestablishment as such was not an object of the American Revolution, religion more generally, including religious difference and disagreement, was part of the mix of grievances that eventually led to the American War of Independence. KEVIN PHILLIPS, THE

states. Nor did disestablishment come about as a consequence of the 1787 Constitution[217] or because of the ratification of the First Amendment in 1791. Nor was disestablishment spurred forward as a downstream consequence of the Establishment Clause of the First Amendment. Rather, disestablishment was a state-law affair that had already been percolating in some states when they first adopted constitutions in 1776 and which continued on until completed in 1833. Each state that once had an established church has a unique story to tell on its path to the adoption of religious voluntaryism.

Travelers to the early American republic were struck by how very "thin the overlay of [the new] national government . . . was" on the country,[218] and how any initiative concerning matters as problematic as church-state relations unquestionably remained with the individual states. As to the First Amendment, it was well understood at the time of its ratification that the religion clauses (indeed the entire Bill of Rights) were adopted out of a felt need to restrain the new national government.[219] Thus the Establishment Clause, by its terms and its design, was to preserve—as a matter of residual state sovereignty—full authority in the states concerning how the law was to deal in any frontal way with the thorny matter of religion.[220] Indeed, it is not too strong to say that during the early republic, the First Amendment was of little use as a standard around which to rally

COUSINS' WARS: RELIGION, POLITICS AND THE TRIUMPH OF ANGLO/AMERICA 91–100, 119–20, 170–90, 194–201, 207–32 (1999).

217. Isaac Backus, along with other Baptists from Massachusetts, went as a delegation to Philadelphia to request that the Second Continental Congress intervene on their behalf as dissenters against the establishment Congregationalists. Their efforts were rebuffed. The Baptists' request caused John Adams to quip: "We might as well expect a change in the solar system, as to expect that [New Englanders] would give up their establishment." *See supra* text accompanying notes 165–69.

218. Mark Noll cites other historians, as well as a contemporary traveler to the new nation, who all observe "how thin the overlay of national government actually was in the new nation," and hence the initiative concerning matters such as church-state relations unquestionably remained in the hands of the states. NOLL, *supra* note 33, at 195 (internal quotations omitted). Noll characterizes the new republic, without an established church, as a "new wineskin" filled with the "new wine" of the evangelicals. *Id.* at 206.

219. *See* Esbeck, *supra* note 10, at 313–21 (collecting authorities).

220. *See* Esbeck, *supra* note 2, at 16 n.54 (collecting authorities). To be sure, when exercising expressly delegated powers the national government would necessarily, without having as its direct object, touch incidentally upon religious questions. Thus, for example, in operating the postal service Congress might be faced with a question as to religion and Sunday mail delivery. *See infra* text accompanying notes 695–97.

the forces in support of disestablishment.[221] Rather, disestablishment was a state-by-state affair, and hard work at that. It was a veritable slog with the path forward marked by local concerns and local personalities, as opposed to an issue that some continental-spanning crisis had elevated to a matter of national importance.[222]

221. *See* 2 MCLOUGHLIN, *supra* note 76, at 783–84 (noting that Baptists in Massachusetts and Connecticut made no use of the First Amendment in the cause of disestablishment) ("[T]he Baptists believed that even if Congress wanted to take some action in the sphere of religion (either to prohibit such establishments as already existed or to encourage them) the laws in each state should and would take precedence. For the antifederalist dissenters, as for the Congregationalists, religion, like education and voter qualifications, was considered a matter of states' rights. When the First Amendment was passed by Congress and ratified by the states, it guaranteed this—it left the question of religious establishment to each state and merely prohibited Congress from making any law 'respecting an establishment of religion or prohibiting the free exercise thereof.' In any case, it aroused no public comment in New England, even though the legislatures of Massachusetts and Connecticut refused to ratify it (it had sufficient support without their votes to become law).").

222. Only once was there an issue very similar to disestablishment that was debated by a nationally representative body. In 1784–87, the Congress under the Articles of Confederation debated and eventually passed the Northwest Ordinance. Thomas Jefferson initially drafted a bill that was severely revised and finally passed in 1784. This statute highlights the primary concerns of Congress over the western lands: the raising of revenue and future admission of states into the confederation.

The ineffectiveness of the 1784 statute prompted Congress to take up the issue again the next year. The result was the Land Ordinance of 1785, which created a mechanism for the sale of territorial lands. The committee draft of this bill reserved four sections in each township: one for education and three for religion. However, floor debate was critical to passage because the Articles of Confederation required unanimity among the thirteen states. As a result, the glebe provision was dropped on April 23, 1785, before the final form of the bill was passed. 3 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS vii (Edmund C. Burnett ed., 1926).

In 1787, Congress again took up the matter as a result of the Ohio Company's interest in purchasing a large tract of the western territory. What is now commonly known as the Northwest Ordinance emerged from committee with a more oblique mention of support for religion, but nothing so tangible as glebe lands. The language proposed by the committee read, "Institutions for the promotion of religion, morality, schools and the means of education shall forever be encouraged." JAY A. BARRETT, EVOLUTION OF THE ORDINANCE OF 1787, at 64, 75 (1891). Again, the final passage of the bill relied on the unanimous support of the states. During floor debate the importance of religion and morality was acknowledged, but the reference to the support of religion was eliminated before the bill became law. The final text read: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 75. This was a defeat for those who sought financial support for religion, but one must remember that the threat of a negative vote by even one state could stop or amend a bill.

The same Congress that refused to allow an oblique reference to government support of religion passed an article in the Ordinance of 1787 preserving the free exercise of religion in the territories. Article One of the Ordinance states: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory." *Id.* at 86; *see also* George W. Knight, *History and*

Those in one state, to be sure, occasionally took note of what was being said and done in sister states, and with what consequences. This section therefore examines the events and literature pushing disestablishment state by state, with a focus not only on church-state relations, but also on how religion was itself being changed. It turns out that as the War of Independence was winding down, American religion (mainly Protestant Christianity) was experiencing a major transition and undergoing great growth. So extensive were the alterations of American society by religion that historians call this period the Second Great Awakening.

Less appreciated, until recently, is how religion was in turn altered by its American context.[223] Citizens increasingly enamored with popular sovereignty also demanded a private right of scriptural interpretation and "liberty of conscience." The rising hunger for a democratic republic was sated ecclesiastically by the rising popularity of congregational and presbyterial forms of church government. Additionally, this upheaval in American religion and church polity added to, and built upon, the changes wrought by the First Great Awakening. Between the two Awakenings there was an interruption in church growth and a pause in interest in spiritual matters. This was caused, in part, by preoccupation with the Revolutionary War, as well as by a growing interest in rationalism and scientific naturalism, both of which were thought to undermine orthodoxy.[224]

Management of Federal Land Grants for Education in the Northwest Territory, *in* 1 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 79, 83–90 (1886).

Thus on the eve of the 1787 Constitutional Convention, Congress had decided that in the territories there was to be no governmental control over individual religious exercise as well as no governmental support of organized religion.

223. *See generally* JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989); NOLL, *supra* note 33.

224. NOLL, *supra* note 33, at 15, 161–65. A dispute has developed among historians as to just how Christian was the founding generation (1774–91) of Americans. It is thought that the answer to this question bears on just how "Christian" are the Declaration of Independence, Constitution, and Bill of Rights. *See generally* MARK A. NOLL ET AL., THE SEARCH FOR CHRISTIAN AMERICA (1983). The thesis here suggests that this is the wrong question to ask when it comes to the nature of the American church-state settlement. Disestablishment was a state-law affair, not the work of the Founders operating at the national level. Nevertheless, measuring the degree of interest in religion by Americans in the new republic is relevant. The problem with "counting Christians" is that few Americans formally joined a church (though they still attended regularly), and fewer still took part in the sacrament of communion. But often these two events were the only indications of church activity for

While the American colonies had been much engaged with religion during the first half of the eighteenth century, from roughly the 1750s to the conclusion of the Revolutionary fighting in 1781, Americans were absorbed with two wars and the attending political convulsions. The French and Indian War (1754–1760) ended with Great Britain gratefully acknowledged by Americans as protectors of the colonies and brothers-in-arms.[225] The large French settlements in Quebec and Acadia (Nova Scotia), now in British hands, remained very Catholic and insistently francophone. The Quebec Act of 1774,[226] the terms of which permitted Catholicism to remain the established religion,[227] so alarmed the American patriots that it was listed among the grievances in the Declaration of Rights adopted by the First Continental Congress in October of 1774.[228] After a failed attempt to enlist Quebec into the rebellion against Great Britain,[229]

which we have data. *See* JAMES HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 111–32 (2003).

225. For discussion concerning religion in the American colonies during the French and Indian War, see generally NATHAN O. HATCH, THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND 31–51 (1977).

226. HILDA NEATBY, THE QUEBEC ACT: PROTEST AND POLICY 47–55 (1972). The complete text of the Act is reproduced in part three of NEATBY.

227. The Quebec Act also provided for the retention of the French language and extended the boundaries of Quebec to include lands which today are occupied by the Province of Ontario and by the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. 1 DOCUMENTS OF AMERICAN HISTORY 75 (Henry Steele Commager & Milton Cantor eds., 1988) (The editorial gloss of the legal description of the territory reads, "territory west to the Mississippi, north to the frontiers of the Hudson Bay territory, and the islands in the mouth of the St. Lawrence."). The Treaty of Paris of 1783, which settled the American War of Independence, also ceded to the new American Confederation the land now embraced by the above-referenced states. *Id.* at 118 (the legal description has the border running through Lakes Ontario, Erie, Huron, and Superior until it turns southward down the Mississippi River). This was called the Northwest Territory, which was soon opened to American frontiersmen. Its settlement was governed by the Northwest Ordinance of 1787.

228. NEATBY, *supra* note 226, at 56–57. Neatby quotes the Declaration of Rights of 1774, as follows:

> And by another Act the dominion of Canada is to be so extended, modelled, and governed, as that by being disunited from us, detached from our interests, by civil as well as religious prejudices, that by their numbers daily swelling with Catholic emigrants from Europe, and by their devotion to Administration, so friendly to their religion, they might become formidable to us, and on occasion, be fit instruments in the hands of power, to reduce the ancient free Protestant Colonies to the same state of slavery with themselves.

Id.

229. GOLDWIN SMITH, CANADA AND THE CANADIAN QUESTION 67–68 (Michael Bliss ed., University of Toronto Press 1971) (1891). Smith notes how the Americans in 1774 tried to have it both ways on the question of Quebec:

the Americans again expressed alarm at the Catholic establishment to the north and northwest. The complaint was tucked in among that famous list of grievances against George III in the Declaration of Independence and adopted by the Second Continental Congress in early July of 1776.[230]

After the many regional revivals of the First Great Awakening, as well as the continent-wide travels of George Whitefield, religious fervor fell back from its early 1740s peak. This pause in growth occurred in all regions and continued on through the Revolutionary fighting. While there was no net loss in the number of ministers actually serving in churches, except among Anglicans,[231] the formation of new churches did not begin to keep pace with the

> The Puritans, or rather ex-Puritans of New England, had made the retention of Roman Catholicism in Quebec one of the counts in their indictment of the British Government. In an address to the British people they spoke of the religion of the Canadians as one "that had drenched Great Britain in blood and disseminated impiety, bigotry, persecution, murder, and rebellion through every part of the world." Afterwards, calling the French Canadians to freedom, they treated the religious question in a different strain. "We are too well-acquainted," they said, "with the liberality of sentiments distinguishing your nation to imagine the difference of religion will prejudice you against a hearty amity with us. You know that the transcendent nature of freedom elevates the minds of those who unite in the cause above all such low-minded infirmities. The Swiss Cantons furnish a memorable proof of this truth; their union is composed of Catholic and Protestant States, living in the utmost concord and peace with each other; and they are thereby enabled, ever since they bravely vindicated their freedom, to defy and defeat every tyrant that has invaded them." The Quebec clergy, however, did not forget the former and, as they probably thought, more sincere manifesto. Their weight was cast into the other scale, and their chief, the Bishop of Quebec, exhorted his people to be true to British allegiance and repel the American invaders.

Id.

230. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3, 5 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS]. Among other enumerated grievances in the Declaration of Independence, the colonists complain that the king had abolished "the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies." *Id.* The foregoing language, while veiled, is undeniably referring to Quebec and expressing the belief, widely held among American patriots, that Catholicism tended to be supportive of absolutist governments.

231. *See* 1 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 212–13 (Rothman & Co. 1983) (1882) ("When the struggle for independence was ended, of ninety-one clergymen of the Anglican church in Virginia, twenty-eight only remained. One fourth of the parishes had become extinct.").

population growth much accelerated by immigration. To be sure, localized revivals continued well into the 1750s and 1760s, mostly on the frontier, and Baptists working with African American slaves (among others), continued their impressive growth.[232] But Baptists were still small in their overall number of members. The two largest groups of churches, Congregational and Presbyterian, fell quiet as revivalist fires cooled, whereas the Anglican churches were increasingly embroiled in the widening political division between mother England and the patriotic cause. Rationalists like Ethan Allen (*Reason the Only Oracle of Man* (1784)) and Thomas Paine (*Age of Reason* (1794)) were soon heralding reason alone, elevating natural philosophy (science), and confidently predicting a dying interest in all religion rooted in revealed scripture. The War of Independence drained the people both financially and spiritually. The push westward added to the social declension. The rugged individualism of the frontier caused further breakup of family and community, and of course localized church life was not possible in remote areas. Thus, church growth was suspended in the leading centers of society, but with continued movements of renewal at society's margins.[233]

This state of religion reversed itself dramatically, however, as the Revolutionary fighting concluded—so much so that it is not improper to describe the period from the mid-1750s to the end of the Revolution as a spiritual plateau with peaks of revivalism on either side. The singular religious feature beginning with the end of the Revolutionary fighting and continuing through the early republic (1780s–1830s) was a remarkable Protestant expansion. No other period in America has witnessed such a dramatic rise in spiritual renewal and conversion, as well as religious influence on the broader public culture. Along with churches some college campuses led the way. Dr. Timothy Dwight, the grandson of Jonathan Edwards, became president of Yale College in 1795. Dwight confronted growing religious skepticism among students head on and debated them over religious questions at numerous public gatherings. By 1802 it is reported that a third of the Yale student body were

232. NOLL, *supra* note 33, at 15, 162–63; NOLL, *supra* note 89, at 177–91 (tracing the development of American evangelicalism from the end of the spectacular revivals of 1740–42 to the death of George Whitefield in 1770, a period of growth but growth that did not keep pace with the exploding increase in population).

233. NOLL, *supra* note 33, at 15, 162–63.

professing Christians. Similar waves of renewal swept Amherst, Andover, and Princeton.[234]

While evangelical religion surged in America, influencing its culture along the way, the American context also changed religion.[235] Thus, a second feature of this new burst of spiritual fervor was a near inversion of the more dominant Protestant denominations.[236] In 1773, the time of the first Revolutionary skirmishes, the most numerous churches were Congregational and Anglican/Episcopal. By the 1830s, however, the Methodists and Baptists had overtaken and far surpassed their sister churches.[237] Presbyterian growth also ran ahead of the increase in the general population, bringing up a respectable but still distant third place.

Historian Mark Noll singles out the Methodist denomination as illustrative of just how remarkable this expansion was:

> When Francis Asbury arrived in America in 1771, there were four Methodist preachers caring for about 300 people. By 1813, three years before Asbury's death, the official Methodist minutes listed 171,448 white and 42,850 African-American members "in full society," served by 678 preachers. By that time these itinerants were visiting about 7,000 local Methodist class meetings, each presided over by a local layperson. As many as one million people

234. CAIRNS, *supra* note 42, at 427–30. *See also* NOLL, *supra* note 89, at 212 (noting that the timing and beneficiaries of the Second Great Awakening is regularly misplaced; it began right after the end of the War of Independence, and the growth occurred principally in the South and rural New England); MAXSON, *supra* note 78, at 150–51 (acknowledging that political and social disruption as a result of Revolution brought an end to the Awakening, but revivals soon broke out again in the late Eighteenth Century).

235. NOLL, *supra* note 33, at 190, 192, 202, 203–04 (describing how religion was altered). *See generally* HATCH, *supra* note 223; BUTLER, *supra* note 223.

236. HATCH, *supra* note 223, at 59–62 (discussing how the Congregational and Anglican churches were unprepared and hence declined in the period from 1790 to 1830).

237. John Wigger records the Methodist situation:

> Between 1770 and 1820 American Methodists achieved a virtual miracle of growth, rising from fewer than 1,000 members to more than 250,000. In 1775 fewer than one out of every 800 Americans was a Methodist; by 1812 Methodists numbered one out of every 36 Americans. By 1830 membership stood at nearly half a million. While other denominations expanded in absolute numbers, the Methodists gained an ever larger share of the religious market. In 1775 Methodists constituted only 2 percent of the total church membership in America. By 1850 their share had increased to more than 34 percent. This growth stunned the older denominations. At mid-century, American Methodism was nearly half again as large as any other Protestant body, and almost ten times the size of the Congregationalists, America's largest denomination in 1776.

WIGGER, *supra* note 35, at 3; *see also* note 34, *supra*.

> (or about one out of eight Americans) were attending a Methodist camp meeting each year.[238]

It was no happenstance that the Baptists and "new side" Presbyterians, along with the Methodists, were the fastest growing churches.[239] They claimed no inherited authority to be listened to, nor sought to stand in the lineage of ancient creeds, but instead appealed openly to common sense and a scripture accessible to anyone who could read. By 1812, these more personal and decentralized approaches to Protestantism had reached full stride.[240] The American religious impulse had become popularistic, personalistic, and democratic.[241] The work of the faith was less focused on the institutional church and more on each individual; lesser attention was given to correct doctrine while greater emphasis was placed on practical living.[242]

238. NOLL, *supra* note 33, at 168.

239. Wigger again assesses the situation:

> It is no accident that American Methodism flourished after, and not before, the American Revolution. The revolutionary era marks a divide between two worlds—between, as Gordon Wood, Alan Taylor, and others have argued, an earlier world ordered through deference, hierarchy, and patronage and a later period in which ordinary people grew increasingly unwilling to consider themselves inherently inferior to anyone else. Destined to fade away in post-revolutionary America was the traditional English world that George Eliot wrote of in *Adam Bede*, where "the keenest of bucolic minds felt a whispering awe at the sight of the gentry, such as of old men felt when they stood on tip-toe to watch the gods passing by in tall human shape." The generation after the Revolution witnessed one of the most turbulent and dynamic periods in American history. It was this generation that began the process of working out the implications of the Revolution, particularly the rise of a free-market economy. There was a pervasive rootlessness to the period as many pulled up stakes to move west, or at least psychologically traded traditional concepts of deference for new ideas about democracy and equality. The years from 1780 to 1820 were, for some, a time of unparalleled opportunity and optimism; for others, they were a time of intense uncertainty and struggle; for nearly everyone, they were a period of unprecedented change. As one noted historian has observed, only rarely are large numbers of people open to large-scale change. The era immediately following the Revolution was just such a time.

WIGGER, *supra* note 35, at 7–8; *see also* note 35, *supra*.

240. NOLL, *supra* note 33, at 207–08.

241. HATCH, *supra* note 223, at 3–46.

242. *Id.* at 3–16. There are scholars who believe that the manner by which the American setting changed the Protestant faith during the early republic had some unfortunate features. The decreased emphasis on doctrine was anti-intellectual, and the diminished role of clergy and the institutional church made Christian faith less grounded. *See* NOLL, *supra* note 33, at 443–45; NOLL, *supra* note 89, at 256–61; NOLL ET AL., *supra* note 224, at 116–20. Perhaps this is

B. Anglican Disestablishment: The Middle and Southern States

Historians like to cluster the original states into Middle Colonies, Southern Colonies, and New England, an organization that works nicely with respect to the push for disestablishment. By the 1750s, the Middle Colonies of Pennsylvania, Delaware, New Jersey, and New York were a melting pot of people with differing European national origins and Protestant religions. While all the American colonies at some level favored Protestantism, and the Middle Colonies were no different, in mid-America only New York held to a de jure establishment for very long.

The Southern Colonies all had Anglican establishments, but by mid-century, the Episcopal system had much weakened, except in Virginia. Due to the Episcopal church's association with England, as well as the labors of Protestant dissenters, disestablishment was on the verge. Maryland, a special case in the South, was first a Catholic haven and later had thrust upon it an establishment of the Church of England.

The Puritan establishments in the New England colonies survived the longest. This is as true in Vermont and Maine as in the original states of Massachusetts, Connecticut, and New Hampshire. Roger Williams' tiny Rhode Island is a unique case, having instituted an advanced degree of religious freedom from its founding.

The account of state-by-state disestablishment that follows is roughly chronological. Disestablishment, more or less, began in the Middle Colonies, moved to the South, and arrived finally in New England. In the case of Delaware and New Jersey, their first constitutions, both adopted in 1776, codified a de facto disestablishment earlier brought about in each colony by voluntaryistic sentiments among Protestant sects. Pennsylvania[243] and Rhode Island[244] can be put to one side as never having had establishments.

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so, but it does not negate that the period was good for the cause of disestablishment and voluntaryism.

243. *See* HUTSON, *supra* note 224, at 133–54 (discussing William Penn's vision for religious freedom).

244. William McLoughlin describes Rhode Island's founder, Roger Williams, and the colony's early history as follows:

> [Roger] Williams, like the Baptists, whose claims he accepted for only a few months in 1639, knew better what he was against than what he was for. "Soul liberty," as he explained it, was a negative not a positive ideal. It asked the state to stop interfering

If a religious establishment is measured by the legal authority to assess taxes for church support, then disestablishment occurred in the remaining states in the following order: North Carolina (1776), New York (1777), Virginia (1776–1779), Maryland (1785), South Carolina (1790), Georgia (1798), Vermont (1807), Connecticut (1818), New Hampshire (1819), Maine (1820), and Massachusetts (1832–1833). Disestablishment in Virginia,[245] and to a lesser degree its occurrence in Connecticut and Massachusetts, has been written on extensively. Additionally, Connecticut and Massachusetts[246] are explored elsewhere in this paper when examining the lives of Elisha Williams, Isaac Backus, John Leland, and Lyman Beecher. Accordingly, the accounts that follow discuss disestablishment in the remaining original states that had religious establishments, plus

> in religious affairs because interference had, as experience demonstrated, led to the oppression of true saints and the persecution of true churches. But precisely what true saints and true churches were Williams spent the whole of his life seeking unsuccessfully. Some of those who came to share the freedom of his "lively experiment" in Rhode Island and Providence Plantations found the answer in mysticism, others in Socinianism, some in Quakerism, and still others in various varieties of the Baptist persuasion.

1 MCLOUGHLIN, *supra* note 76, at 7–8. McLoughlin then points out that, while first in time, Williams was emphatically not first in place. New England considered Rhode Island "the licentious Republic" and the "sinke hole of New England" because of its doctrinal confusion, and Williams, as well as his works, was either ignored or intentionally avoided in public even by Baptist crusaders in later generations. *Id.* at 8.

245. *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 (1977); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 491–95 (1968). On the crucial role of the evangelicals in the struggle for disestablishment in Virginia, Buckley writes:

> But the role of Madison and Jefferson and the liberal elements who gathered under their banner can be overplayed, just as the significance of the "Memorial and Remonstrance" as representative of the sentiments of Virginians can be overemphasized. To do so is to distort the meaning of what happened. Despite the best efforts of Madison's allies to circulate the memorial, less than one fifth of those who signed petitions against the assessment in 1785 put their names beneath his composition. The key to understanding the nature of the religious settlement in Virginia rests with the dissenters, the members of the evangelical churches, for they wrote and signed the overwhelming majority of the memorials which engulfed the legislature that year; and their representatives provided the votes in the Assembly which determined the outcome. Had the evangelicals, and particularly the Presbyterians, opted for the assessment bill, Virginia would have had a multiple establishment of religion instead of Jefferson's bill.

BUCKLEY, *supra*, at 175.

246. *See, e.g.*, John Witte, Jr., "*A Most Mild and Equitable Establishment of Religion*"*: John Adams and the Massachusetts Experiment*, *in* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 1 (James H. Hutson ed., 2000).

Vermont and Maine, which have not been given proper attention in the legal literature.

1. Delaware

Delaware's religious heritage was simultaneously the least typical and the least English. Survival in this small colony consumed all available energies, leaving little time to accommodate or contemplate religion. From Lutheran, to Reformed, to Quaker, to Methodist, the dominant sects of Delaware were generally dissenters in neighboring colonies. The combination of a hard-scrabble fight for survival and the religious pluralism of the people ensured that the government and the church would maintain their mutual independence in Delaware.

First settled by the Swedes in 1638 in an effort to compete with Dutch trade,[247] Delaware (originally named "New Sweden") was home to the first Lutheran minister in America.[248] The colony was small and poorly supported by Sweden.[249] Survival consumed the

247. JOHN A. MUNROE, COLONIAL DELAWARE: A HISTORY 13–14 (1978). According to Munroe:

> The Swedish settlement of Delaware came about as a result of Dutch interest in the area. Seventeenth-century Sweden was a kingdom renowned for great military prowess but of limited commercial development. Swedish armies had won control of most of the shores of the Baltic Sea, but the trade of the area was dominated by the Dutch. In the late sixteenth century 55 percent of the ships entering the Baltic were Dutch, and they carried 75 percent of the cargoes. When King Gustavus Adolphus of Sweden founded the city of Gothenburg (Göteborg in Swedish) in 1619 in order to have an Atlantic port (outside the Danish-controlled entrance to the Baltic Sea), the new city was so Dutch dominated that ten of the eighteen members of the first city council were Dutch, and the Dutch language was accepted on equal terms with Swedish.

Id.

248. *Id.* at 19–20 ("Besides this clergyman—the Rev. Reorus Torkillus, the first Lutheran pastor in America—and the new officers of the colony, little is known of the passengers brought on this second voyage of the *Key of Kalmar*.").

249. *Id.* at 25–26. Munroe writes:

> For one reason or another—war, lack of population pressure, the perilous voyage—these appeals [for soldiers, farmers, and women] went unanswered. In 1647, after nine years of settlement, there were but 183 men, women, and children in the whole of New Sweden, which was a weak array of farms and forts strung along the Delaware.
>
> Yet this frail Scandinavian colony survived, or at least its people did, though stronger and more promising colonies were abandoned or destroyed. Some of the colonists did desert to the English or the Dutch, and most or all would willingly have gone home to Sweden at one time or another if they could have. But in

attention of the settlers, eliminating any substantial development in the nature of church expansion. The irritation of the Dutch governor in New Amsterdam just to the north culminated in an attack on tiny New Sweden in 1655 and its surrender to Dutch authority.[250] The governor would have only nine years to savor his victory. In 1664, the surrender of New Amsterdam to England placed control of all modern New York, Pennsylvania, and Delaware in the hands of James, Duke of York (soon to be James II).[251] When William Penn asked Charles II for a grant in the New World, he was given control of Pennsylvania in 1681,[252] and Delaware was ceded by James to

> America they thought themselves a people apart, with their own customs, language, and religion. The cultural unity of the settlers was fortified by the presence of Swedish Lutheran pastors sent to America in an unending series until after the American Revolution.

Id.

250. *Id.* at 30–31. Concerning the attitude of the Dutch governor in New Amsterdam, Munroe records:

> The death blow to New Sweden came from the very people who had inspired its birth; Dutch it had been, and to the Dutch it was returned. Peter Stuyvesant, who became governor of New Netherland in 1647, was annoyed by the Swedish presence on the Delaware. He was experienced in colonial affairs through service in the West Indies, where armed combats were frequent and islands passed back and forth between the European powers like pieces in a game. He had also become crippled in such service, losing a leg in battle with the French on the island of St. Martin.

Id. Concerning the surrender, Munroe relates:

> On September 15, 1655, near Fort Christina, Stuyvesant and [Johan] Rising met to sign the capitulation, and at three o'clock on that afternoon the Swedes marched out of the fort with drums beating, fifes playing, banners flying. In ensuing days Rising did his best to urge all Swedes to return to their homeland, but he had little influence. In the end only thirty-seven people comprised his party when he left New Amsterdam for Europe on October 23.

Id. at 40.

251. *Id.* at 60. Munroe's account states:

> [Stuyvesant was] surprised by the arrival of the English, with a demand for his surrender, in August 1664. New Amsterdam was then practically defenseless and its residents unwilling to sacrifice themselves for a lost cause, particularly when they learned that [Richard] Nicolls, who was reenforced by militia from New England and from the English towns of Long Island, offered them protection as well as peace.
>
> Thus circumstanced, Stuyvesant surrendered on Monday, August 29.

Id.

252. *Id.* at 81. Munroe explains the circumstances of this land grant as follows:

> As a member of Parliament, the elder William Penn had gone to Holland in 1660 to bring Charles II back from exile and restore him to his throne. On the return trip he was knighted by the king, who also befriended him by many subsequent appointments, including that of commissioner of the navy. In this post

Penn in 1682.[253] Thus, territory which had already passed from Swedish Lutheran to Dutch Reformed to Anglican control was now under the jurisdiction of a Quaker proprietor. So ended any further flirtation in Delaware with a church established by law.

While Pennsylvania governance of the "Lower Counties," as Delaware was sometimes called, was good for religious freedom,[254] it proved troublesome and ill-fated politically. Penn was forced to traverse the Atlantic more than once while maneuvering politically to maintain control.[255] Finally in 1701, Penn agreed to allow Delaware to separate from Pennsylvania,[256] which was effected in 1704.[257] It was, however, to remain under its Quaker proprietor.

> Sir William worked on intimate terms with the Duke of York, who was Lord High Admiral and whose flagship Penn commanded in the Second Dutch War.
>
> King Charles was not as generous with his money as with his honors, and when the admiral died in 1670 the Crown owed him a considerable sum. Ten years later, the debt being still unpaid, young Penn, the admiral's heir, petitioned the king for a grant of land in America as part or full satisfaction. The request was inspired not only by the persecution Quakers suffered in England, in common with other radical dissenters, but by Penn's own experience with the Quaker settlements in New Jersey.

Id. at 79.

253. *See* COBB, *supra* note 245, at 440 ("Though a Quaker of very decided type, he was yet a friend of Charles II and his brother James, and through this friendship found easy work in obtaining from the king the charter creating the province of Pennsylvania, to which the duke of York added by gift that part of his own American possessions, which had received the name of Delaware.").

254. MUNROE, *supra* note 247, at 88 ("[T]he spirit of Penn, who was determined, as he wrote in the preamble to his Great Law, to establish a government where 'true Christian and Civil Liberty' would be preserved and wherein 'God may have his due, Caesar his due, and the people their due,' was largely retained in the Lower Counties [Delaware] as in Pennsylvania.").

255. Controversy with the Calverts in Maryland over the control of Delaware caused Penn to travel to his colony in 1682. *Id*. Penn then felt compelled to follow Lord Baltimore back to England in 1684 to continue pressing his case. *Id*. at 91–92. Penn returned to America in 1699 under the threat by the Privy Council of losing his holdings. *Id*. at 108. In 1701 he returned to England upon receiving reports of the possible annulment of his charter. *Id*. at 113.

256. *Id*. at 116. Munroe writes:

> The charter of 1701, conferring a large measure of autonomy on his colonists and permitting their division into two colonies, was the price Penn reluctantly paid for putting his house in order before he sailed for England on November 1, 1701. With the likelihood before him of losing his American possessions, it was not a time for petty quarrels over the terms of their government.

Id.

257. *Id*. at 120. According to Munroe:

> The only recourse left to the Lower Counties was to go their own way, as they had been threatening to do. After a conference with his chief justice, Governor

The years between 1704 and 1776 were filled with a succession of crises that often threatened the Penn family's claim and may have adversely affected the church-state arrangement that was developing in Delaware. An aborted sale of both the Pennsylvania and Delaware governments to the English crown in 1712[258] and an unsuccessful challenge in 1715 to the Quaker proprietorship of Delaware by a Scotsman of Anglican church sympathies[259] are but two events in the soap-opera history of the colony during these years.

While the Lutherans were the first religious body to settle in Delaware, the Presbyterians became the more significant denomination in the early eighteenth century. Tracing their roots in the colony back to 1654 and the Dutch Reformed Church,[260] and reinforced by Scotch-Irish immigration, the Presbyterians became the largest denomination in New Castle County.[261] The appearance

> Evans [of Delaware] decided there must be a special election before a separate assembly could be held in the Lower Counties. Although writs were first issued for the election of representatives on May 12, 1704, to attend an assembly on May 22, the election was apparently postponed until October 25, with the first Delaware assembly, consisting of four representatives from each county, meeting in New Castle in November 1704. . . .
>
> . . . .
>
> . . . The political separation from Pennsylvania, so far as it went, was permanent.

Id.

258. *Id.* at 133 ("The sale of Penn's rights to government, under way when the will was written in 1712 but then suspended by his illness even though a down payment of £1,000 had been made, was eventually canceled and the down payment restored to the Crown.").

259. *Id.* at 131. Munroe explains:

> The new claimant was a Scottish nobleman, John Gordon, the sixteenth Earl of Sutherland. As far as is known he had never seen the Lower Counties nor any part of America, in that respect being like William Penn when he sought an American province. Just as it was the interest of fellow Quakers that won Penn's attention to America, so it was the interest of fellow Scots in the Delaware valley that led Sutherland to petition King George for a grant to the three Lower Counties on the Delaware.
>
> A kinsman named Kenneth Gordon, of whom little is known, and a well-remembered Anglican missionary of Scottish birth, the Rev. George Ross, rector of Immanuel Church in New Castle, are said to have brought the uncertain status of the Lower Counties to Sutherland's attention. Arrears of over £120,000 were due him from the Crown for his loyalty to the Hanoverian succession in 1715. He cited "his great zeal and activity for the Protestant Succession" in requesting a grant of the Lower Counties which, his petition read, "he is ready to prove do belong to the Crown."

Id.

260. *Id.* at 171 ("The beginnings of Presbyterianism in the Lower Counties can be traced to services held by Dutch Reformed ministers at New Castle as early as 1654.").

261. *Id.* at 172. Munroe reports:

of the itinerant English preacher, George Whitefield in 1739,[262] created controversy within this body.[263] In the early 1740s, Delaware's Presbyterians divided,[264] leaving the "new side" evangelicals the dominant church.[265]

An aftershock of the First Great Awakening in Delaware was the growth of Methodism beginning in the 1770s. While the Great Awakening of the 1720s to the 1750s had been predominately an urban phenomenon, Wesleyan preachers now took their message to the highways and byways of the colony, preaching to any who would listen.[266] The itinerant preacher Francis Asbury was a significant

> The great Scotch-Irish immigration of the eighteenth century enormously strengthened Presbyterianism, especially in New Castle County, where it became the largest denomination. Many ministers came with the new immigrants, but since the Presbyterians did not require episcopal ordination and indeed opposed the institution of episcopacy itself, it was easier for them than for the Anglicans to create ministers in America. One handicap to their growth, however, was their demand that ministers be educated.

Id.

262. *Id*. at 170 ("A vigorous missionary effort was initiated in the year 1739, when the Reverend George Whitefield landed at Lewes on October 30.").

263. *Id*. at 171–74.

264. *Id*. at 172. Munroe explains the beginnings of this rift when he writes:

> Many Presbyterian ministers were shocked by the idea of exalting enthusiasm above reason and theological knowledge. In 1741 these conservative churchmen expelled [Gilbert] Tennent and the enthusiasts from the synod, thus beginning a schism between what were called Old Side and New Side Presbyterians. One of the Old Side ministers, the Reverend Francis Alison, concerned to assure a continued supply of educated young men for the ministry, opened a school at New London, Pennsylvania, in 1743, and soon secured financial assistance from the synod.

Id.

265. *Id*. at 174. After a score of years, the schism was healed on the surface but still sore underneath. As Munroe explains:

> The great schism among the Presbyterians was settled in 1758, by which time the emotional evangelists of the New Side far outnumbered the conservatives of the Old Side. The latter, however, were tenacious in their desire to preserve a school of their own in case the old battle erupted once again, and they carefully fostered the Newark Academy as a resource against revivalist enthusiasts, who had replaced the Log College with the College of New Jersey, later Princeton, as their chief academy. For this purpose fund-raising teams were sent south to the Carolinas and the West Indies. Two graduates of Alison's school, Dr. Hugh Williamson and the Reverend John Ewing, were sent to England, where they solicited funds with some success from such notables as Dr. Samuel Johnson and the king himself.

Id.

266. *Id*. at 178–79. As Munroe records:

> The neglected farmers of the rural Lower Counties, those not close to churches or meeting houses, were finally rescued from their cultural isolation by a tardy portion of the Great Awakening, the Methodist revival of the 1770s. Whereas

influence on Methodism in Delaware,[267] and Methodist preachers riding their circuits converted large numbers among these colonists.[268] By 1800 Delaware was thoroughly Wesleyan. Unaffected by the apolitical ways of Methodist leaders, Methodist laity inevitably brought their faith to bear on matters of practical government.[269]

> Whitefield, after his initial reception at Lewes, had concentrated on the crowds who assembled to hear him in cities and towns and the more densely populated farming regions nearby and found his readiest welcome among the Presbyterians, the Methodist preachers sent to America by John Wesley in 1769 and thereafter went everywhere and spoke to anyone who would listen.

Id.

267. *Id.* at 179 ("The greatest inspiration for Methodism in Delaware came from Francis Asbury, who arrived in America in 1771 and remained on this continent until his death in 1816.").

268. *Id.* at 181. Munroe reports:

> The early Methodist preachers were generally pacifists and almost all abolitionists, who took particular pains to preach to African slaves as well as to their white masters. As a result of their efforts and of the crippling effect of the Revolutionary War on the Church of England, the greater part of the rural population of the Lower Counties was made Methodist within one generation. By 1800 it is estimated that not only was Methodism the prevailing denomination in Delaware but Methodists formed a larger proportion of the population of Delaware and of the entire Delmarva Peninsula than of any other portion of the United States.

Id.

269. The preference of evangelism over politics among the Methodist clergy of the early Republic is well documented. William Henry Williams, however, in his examination of Methodism in Delaware, provides the reader with a more realistic context concerning Methodists and early American politics. WILLIAM HENRY WILLIAMS, THE GARDEN OF AMERICAN METHODISM: THE DELMARVA PENINSULA, 1769–1820 (1984). At least three factors exerted a restraining influence on early Methodists when it came to political involvement. First, the Tory position of John Wesley and the founder's heavy-handed rule concerning the maintenance of fellowship with the Church of England created a difficult dilemma for American Methodists. *Id.* at 39–41. Second, the rule of Francis Asbury in America, forbidding a break with the Anglicans and requiring itinerancy to the exclusion of settling ministers, quelled an early internal rebellion by Methodists in Virginia. *Id.* at 51–56. In 1776, the Methodists in Virginia had opposed the disestablishment of the Anglican Church. *Id.* at 39. By 1779, however, attitudes among native Virginian Methodist ministers had changed considerably. Williams writes:

> From Judge White's home in Delaware, Asbury exercised control over Methodism north of the Potomac, but he had little influence in Virginia and North Carolina where the majority of Methodists lived. In those two states a young, native-born ministry had taken command, and it had little reverence for the Church of England. Predictably, Virginia Methodists reversed an earlier position by joining the Baptists in 1779 in supporting the disestablishment of Anglicanism.

Id. at 53–54. While Asbury later reined in the Virginia and North Carolina Methodist laity to an "old Methodist" position, he was only successful because of the authoritarian structure of early Methodism and the great respect Methodists had for both Asbury and Wesley. *Id.* at 49–50, 172–74. Finally, Methodism's dedication to being a "people apart" discouraged

Although the Penn family was Quaker and neighboring West Jersey was a Quaker enclave, the Society of Friends remained small in Delaware though looming large in political and economic influence.[270] Baptists[271] and Catholics[272] were also present in

unnecessary involvement with government and encouraged the use of the church as a private adjudicating as well as policing institution. *Id.* at 168–71. Crime was noticeably reduced and disputes normally taken to civil court were decided by either ministers or committees of laymen within the congregation. *Id.* As Williams writes:

> To be a people apart, it was important to keep all levels of government at arm's length. To do this, Peninsula Methodism tried to assume many responsibilities traditionally the prerogative of civil authority. It did so with considerable self-confidence, and why not? As itinerant Thomas Rankin intimated, the Methodist message could do a far better job in shaping the actions of men than the laws of government could.

Id. at 169. These factors, which urged Methodists to stay as apolitical as possible, did not hold forever. Williams points out that Methodists in Delaware comprised the largest single voting block in the state and were actively pursued by politicians. *Id.* at 171. Many prominent men found it impossible to lay aside the mantle of leadership after converting to Methodism, and they continued to be active in all levels of politics. *Id.* at 172. In Delaware between 1789 and 1801, Methodist laity could be found in local, state, and federal elected positions. For example, Richard Bassett served as a U.S. senator (1789–93), governor of Delaware (1799–1801), and was one of John Adams' "midnight appointments" to the federal bench. *Id.* Concerning tax support of religion, Williams insinuates that the Methodist position against general assessments was motivated by pragmatism rather than principle. *Id.* at 175–76. However, in light of his own depiction of the Methodist desire to be a "people apart" and the growing numbers and influence of Methodists both in society and government, it is likely that devotion to the principle of voluntaryism was at least as influential as the circumstantial practicalities. For example, Williams admits that the question of tax support for the church forced many otherwise conservative voters to side with the Democratic-Republicans in both Maryland and New England. *Id.* at 175, 176 n.37.

270. MUNROE, *supra* note 247, at 182. Munroe writes the following about the Quakers:

> The Quakers, too, remained small in number, though their mercantile prominence, their entrepreneurial adventurousness, and their developing philanthropic interests allowed them to play a leading part in the economic and, to a lesser degree, the cultural life of the Wilmington area. There were active Quaker meetings in Kent County as well as in New Castle, but only a few Quakers resided in Sussex.

Id.

271. *Id.* at 181–82. About the Baptists, Munroe records:

> Besides the Methodists, another group actively proselytizing in Delaware in the 1770s was the Baptists. . . .
>
> The Welsh Tract Church was the mother church to a number of Baptist congregations in Delaware—at Wilmington, Duck Creek, and Mispillion, for instance. In Sussex County, however, during the years of the Revolution two Baptist preachers from Virginia, Elijah Baker and Philip Hughes, won many converts among the unchurched residents of English descent. . . . [T]he Baptists [were never] a major sect in Delaware, perhaps because they never attained an organization as efficient as that of the Methodists.

Id.

Delaware, but neither church rose to any level of prominence. Similar to the experience of other colonies, the Church of England struggled to survive in Delaware.[273]

After the Second Continental Congress declared the colonies independent states, Delaware was the first to complete a state constitution.[274] The 1776 constitution officially adopted the name "Delaware"[275] and expressly stated that there was to be no established church,[276] albeit only Christians were allowed to hold

272. *Id.* at 183–84. Munroe accounts for the Catholics as follows:

> Like . . . the Methodists, the strength of the Catholics in the Lower Counties seemed at first to be centered firmly on the Delmarva Peninsula rather than to flow outward from the Delaware River settlements of New Castle and Philadelphia, where the Anglicans, Presbyterians, and Quakers had their oldest places of worship. Some of the first Catholics in the Lower Counties may have come directly to the Delaware River valley as part of the English migration of the late seventeenth century, but it is likely that many if not most of them moved into the Delaware counties from Maryland, where the first Catholic settlement had been made in 1634.
>
> . . . .
>
> The French alliance and the presence of French troops during the Revolutionary War helped give Catholicism increased prestige in this area. The resumption of Irish immigration after the war and the arrival of Catholic refugees from France and especially from the French West Indies in the 1790s significantly increased the number of Catholics in Delaware and occasioned the establishment of Catholic churches in New Castle and Wilmington. The really large growth in the Catholic population, however, did not come until the great migrations of the middle and late nineteenth century.

Id.

273. *Id.* at 170. Concerning the Church of England, Munroe writes:

> Five Anglican clergyman were the largest number in the Lower Counties at any one time, and the consequence was that most of those residents who through family tradition were of Church of England affiliation in practice were unchurched. The few Anglican clergymen made some effort, as they were ordered, to baptize blacks as well as whites, and since most of the substantial farmers who held slaves in the Lower Counties were nominally Anglican, a great part of the African element was brought into the Christian community by the ceremony of baptism and, probably less commonly, by some religious instruction. Yet among both English and African groups in rural Delaware there remained a fertile field for a vigorous missionary effort.

Id.

274. JOHN A. MUNROE, HISTORY OF DELAWARE 69–70 (1979) ("The convention that assembled in New Castle on August 27, 1776, and completed its work in less than a month produced not only the first state constitution for Delaware but the first constitution for any state that was written by a convention elected especially for this purpose.").

275. DEL. CONST. of 1776, *reprinted in* 1 CONSTITUTIONS, *supra* note 230, at 562.

276. The 1776 constitution made no provision for free exercise of religion or freedom of conscience, perhaps relying on Delaware's long history of toleration. Article 29 simply reads:

government office.[277] In 1792, Delaware adopted a new constitution that eliminated religious restrictions on public office.[278] As a result of its long experience with freedom of worship out of religious conviction, Delaware was one of the earliest states to guarantee free

> There shall be no establishment of any one religious sect in this State in preference to another; and no clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastorial function.

Id. at 562, 567–68.

277. Article 22 provides as follows:

> Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:
>
> "I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced."
>
> And also make and subscribe the following declaration, to wit:
>
> "I, A B, do profess faith in God, the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."
>
> And all officers shall also take an oath of office.

Id. at 562, 566. The religious declaration would have posed problems for Unitarians and for Catholics as well who embraced several sacred writings not accepted by Protestants as part of the Old or New Testaments.

278. MUNROE, *supra* note 274, at 83. According to Munroe:

> Religious liberty was advanced by a provision in the new constitution declaring that a person's religion could not be a reason for denying him any office in Delaware. This was an important provision, for although freedom of worship had existed in colonial Delaware, only Protestants could qualify for membership in the assembly. Alliance with France in the Revolutionary War had helped dispel the anti-Catholic bias most of the colonists brought with them to America. The new provision was specifically meant to open public service to Catholics; it also served Jews and other religious minorities.

Id. Article One of the 1792 constitution provides the following two sections:

> SECTION 1. Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship, nor a preference be given by law to any religious societies, denominations, or modes of worship.
>
> SECTION 2. No religious test shall be required as a qualification to any office, or public trust, under this State.

DEL. CONST. of 1792, *reprinted in* 1 CONSTITUTIONS, *supra* note 230, at 568.

exercise of religion for persons of every religious tradition, Christian and non-Christian alike.

2. New Jersey

Religious freedom in New Jersey was forged by a diverse array of religious traditions. Dutch Reformed, Presbyterian, Quaker, and Congregational influences each took their turn shaping and molding the role of religion in public life. Like other Middle Colonies, New Jersey's "melting pot" environment had produced a spirit of toleration and liberty by the time independence was declared.

The first Europeans in New Jersey were the Dutch. When New Netherlands was taken from the Dutch by the English in 1664, James, Duke of York, already had plans to grant the lands between the Hudson and Delaware Rivers to Lord Berkeley and Sir George Carteret.[279] Thus, the "Duke [of York]'s Laws"[280] binding in New

279. COBB, *supra* note 245, at 400. Cobb explains the connection between these dealings and religious freedom:

> There was also arrayed against [the Church of England] the explicit "concession" of the proprietaries, which, after the manner of a fundamental law, guaranteed a complete religious freedom. These proprietaries were Lord Berkeley and Sir George Carteret. On the conquest of New Netherlands Charles gave the entire province to his brother James, the duke of York. In expectation of this gift, James had already bargained with Berkeley and Carteret—who were also of the Carolina proprietaries—for the southern portion of the territory which was west of the Hudson. At the fulfilment of this bargain the new owners of the province were ready with their plans for the settlement of their colony, and at once published a scheme, embodying certain principles and stipulations, which they called "Concessions," and by which they desired to attract settlers.

Id. (footnote omitted).

280. JOHN E. POMFRET, COLONIAL NEW JERSEY: A HISTORY 7 (Milton M. Klein & Jacob E. Cooke eds., 1973). Pomfret introduces the reader to the Duke of York's Laws, writing:

> On March 1, 1665 Nicolls issued a comprehensive code of governance—the Duke's Laws. Applicable at first only to York County, which embraced most of the English about New York, it was extended eventually throughout the proprietary. Borrowed chiefly from the Massachusetts code and thus based upon American experience, one may regard the Duke's Laws, in part, as Nicolls' effort to woo settlers from New England. Lacking provision for an assembly, freedom was given in local government, and the English towns on Long Island were permitted to retain their town meetings. Happily most of the local Dutch offices had their equivalents in the English system, so the transition from Dutch to English rule was easily accomplished. The Duke's Laws also provided a broad religious toleration for Protestants. No one could be molested, fined, or imprisoned for a difference in religious opinion. Each town was required to support a church of its own faith and could choose its own minister. Nicolls believed that only the most hide-bound New

York did not apply to New Jersey,[281] whereas the treaty with Holland guaranteeing religious liberty for the Dutch did.[282] Lord Berkeley granted the western half of New Jersey ("West Jersey") to two Quaker proprietors who intended to create a sanctuary for their oppressed brethren. Thus, as of 1664, West Jersey, as a Quaker proprietorship, had no establishment. East Jersey had an Anglican establishment in theory, but with express religious freedom for Dutch Reformed residents. This period of "the Jerseys" lasted until the two regions were again merged by royal decree in 1702.[283]

Englander could take exception, especially in the light of the religious persecutions then taking place in England.

Id.

281. *Id.* Pomfret continues:

> Unknown to Governor Nicolls, for he did not learn of it until November 1664, the duke on June 4, by a deed of lease and release, granted two trusted friends, Lord John Berkeley and Sir George Carteret, a substantial portion of his proprietary. New Jersey, named for the birthplace of Sir George, the isle of Jersey in the English Channel, embraced all the territory east of the Delaware and south of a line connecting . . . 41° N on the Hudson.

Id.

282. COBB, *supra* note 245, at 325. Cobb explains:

> In the "articles of Capitulation," in 1664, it was specifically agreed that, "The Dutch here shall enjoy the liberty of their Consciences in Divine Worship and Church discipline." The intent of this agreement was that the Reformed Church should enjoy a complete autonomy in its own affairs, and not be subjected to the interference by the magistrates, which other Churches were compelled to submit to until near the end of the colonial period. The principles thus obtaining were in the main respected by the English governors, though some departures will appear. The Dutch themselves were so jealous and watchful for these rights, that, on the resumption of the province by the English, they refused to take the oath of allegiance to the king of England, until assured in writing "that the Articles of Surrender are not in the least broken, or intended to be broken, by any words or expression in the said oath."

Id.

283. *Id.* at 401. Cobb explains Lord Berkeley's motivation and the result when he writes:

> With the reconquest of New York by the English began a new movement in the history of New Jersey. Lord Berkeley, who was old and wished to rid himself of care, sold the western half of the province, for a thousand pounds, to John Fenwick and Edward Byllinge, men of prominence among the English Quakers. With these two William Penn, Gawen Laurie, and Nicholas Lucas soon became associated, and these Quaker proprietaries, desiring not only a place of asylum for their co-religionists but also a territory for their own government, easily made an agreement with Carteret for the division of the province. Thus New Jersey became "The Jerseys," a term which has lasted in common speech down to this day, though the two provinces were reunited by royal decree in 1702.

Id.

Although East and West Jersey were again under the united rule of the English crown after 1702, the colony was never effectively under the control of the Church of England.[284] The English establishment existed only on paper. With vestiges of the Dutch Reformed establishment lingering,[285] New Jersey continued to evolve under the influence of Puritans migrating south from New England,[286] Presbyterians fleeing Scotland because of persecution under Charles II,[287] Quakers seeking refuge in West Jersey,[288] and the uniquely American ideas percolating out of the First Great Awakening.[289] Jonathan Edwards, who was the leading American figure during the Awakening, was persuaded to move to New Jersey to become president of the College of New Jersey at Princeton, but served only one month before his death.[290] Ultimately the leadership of the college fell to John Witherspoon in 1768,[291] a teacher to James Madison and a signer of the Declaration of Independence.

The church-state settlement in the colony gradually evolved from the 1664 treaty with Holland to the state constitution of 1776. As a condition of the 1664 surrender to the English, the Dutch were guaranteed freedom as to doctrine and polity for their Reformed

284. *Id*. at 408.

285. *See supra* note 282 and accompanying text.

286. POMFRET, *supra* note 280, at 98.

287. COBB, *supra* note 245, at 400.

288. *Id*. ("Quakers fled thither from the hostile atmosphere of England and New England.").

289. POMFRET, *supra* note 280, at 218–46. The Great Awakening in New Jersey had its greatest effect on the Presbyterians. The denomination was sharply divided between "old light" and "new light" parties. The new light party initially drew its clergy from the "Log College," a seminary in Pennsylvania that was founded in 1727. As the controversy escalated, new lights established the Synod of New York and founded the College of New Jersey (Princeton) in 1746. *Id*. at 219–20. Concerning the "melting-pot" nature of New Jersey's religious climate, Pomfret writes:

> The mid-eighteenth century revealed endless diversity and change. Contributing factors were the interaction of ethnic and religious patterns, varying economic activities, and external and internal migration. Though some communities sought to preserve their religious and ethnic solidarity, all were affected by improved communication and transportation and by the dissemination of the printed word. Due to her geographical situation, New Jersey was subjected to the continuous flow of innovation and change as it proceeded along the dynamic New York-Philadelphia highway.

Id. at 240.

290. *Id*. at 223.

291. *Id*. at 223–25.

church.[292] The English proprietors of the colony reinforced this promise with concessions meant to attract settlers from among the many sects elsewhere.[293] Although weak in the two Jerseys, the Church of England demonstrated both its willingness and ability to compete for souls without the privileges it enjoyed in the South.[294] Early in the eighteenth century, the English crown made attempts to exert authority over religious affairs,[295] but the result amounted to a paper establishment having no efficacy in practice.[296]

292. *See supra* note 282 and accompanying text.

293. *See, e.g.*, THE CONCESSION AND AGREEMENT OF THE LORD PROPRIETORS OF THE PROVINCE OF NEW CAESAREA, OR NEW JERSEY, TO AND WITH ALL AND EVERY THE ADVENTURERS AND ALL SUCH AS SHALL SETTLE OR PLANT THERE (1664), *reprinted in* 5 CONSTITUTIONS, *supra* note 230, at 2535. This "Concession" provides, in pertinent part, as follows:

> That no person qualified as aforesaid within the said Province, at any time shall be any ways molested, punished, disquieted or called in question for any difference in opinion or practice in matter of religious concernments, who do not actually disturb the civil peace of the said Province; but that all and every such person and persons may from time to time, and at all times, freely and fully have and enjoy his and their judgements and consciences in matters of religion throughout the said Province they behaving themselves peaceably and quietly, and not using this liberty to licentiousness, nor to the civil injury or outward disturbance of others; any law, statute or clause contained, or to be contained, usuage or custom of this realm of England, to the contrary thereof in any wise notwithstanding.

Id. at 2535, 2537.

294. POMFRET, *supra* note 280, at 112. Pomfret explains:

> The Anglican Church at the close of the seventeenth century became a church militant, waging war against deism and teaching a positive Christianity. It would stand erect, without benefit of fine, persecution, or official sponsorship, and it would carry its message to the people. In 1699 the Society for the Promotion of Christian Knowledge (S.P.C.K.) was organized, and the church set out to regain its lost membership.

Id.

295. COBB, *supra* note 245, at 406–07. Cobb discusses the approach by English officials to recognize an establishment of the Church of England:

> The other items of the instructions referring to religion proceeded upon the supposition, either that the Church of England had already been established in New Jersey, or that it could be established by force of the instructions themselves. . . .
>
> . . . [I]t is possible that . . . the home government considered itself competent to establish the Church of England in New Jersey by royal decree; as though the colony, which had sought the direct government of the crown, must accept the queen's pleasure in things ecclesiastical as well as civil. Thus in a province, which did not possess a single Church of the English communion, the governor is vested with ecclesiastical authority. . . . The governor was also charged with a care for Church buildings and the support of ministers; to induct no man without a certificate from the bishop of London; to remove any scandalous minister; to constitute ministers

When independence was declared in 1776, New Jersey settled any lingering uncertainty concerning church-state affairs by expressly prohibiting in its constitution the establishment of religion.[297]

members of their own vestries; and to report to the bishop of London, as having colonial ecclesiastical jurisdiction.

Id.

296. *Id.* at 407–08. Cobb continues:

> The really absurd thing about these instructions is, that the Churches of New Jersey were all of other than the Anglican communion, and the explanation of their purpose is, either the intent to dragoon the Reformed and Presbyterian Churches into conformity, or to confer power over such Episcopal Churches as might thereafter be organized; while behind it all is the evident thought that the royal authority carried the Church of England into the province. It is only thus that we can understand the phrase, "as by law established." The book of common prayer and the Anglican Church were established by law in England, but the only possible way of using those words with reference to New Jersey was with the idea that English Ecclesiastical law covered all parts of English dominion—an idea very easily demonstrable as incorrect.
>
> For in no other colony had this general dominion been thought sufficient for the establishment of the Church. The Virginia Church was established by the colonial assembly; that in Carolina by the charter. The royal authority never affected such power in New England or Pennsylvania; and in New York the angry struggle between Fletcher and the assembly was based on the understanding that an act of the colonial legislature was necessary for establishment. The only other colony, which bears any resemblance in this respect to New Jersey, is Maryland. But in Maryland, when William [and Mary] assumed the direct government of the province, the establishment of the Church, attempted by a specific and detailed order of the king and queen in council having all the force and effect of a charter, was supplemented by an act of the colonial legislature. In New Jersey the peculiar situation was that no such order was made, and that the establishment was simply taken for granted without any law or decree on which to base it. The colonial legislature had never enacted such a law, nor did it afterward supply the deficiency. Bancroft speaks of the Church of England as established in New Jersey in 1702, but the only ground for the statement is in Cornbury's instructions, which in reality assume that which was not true.

Id.

297. N.J. CONST. of 1776, *reprinted in* 5 CONSTITUTIONS, *supra* note 230, at 2594, 2597–98. This constitution provided:

> XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place or worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates for the purpose of building or repairing any other church or churches place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.
>
> XIX. That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious

Pomfret summarizes the religious pluralism of New Jersey as the War of Independence was getting underway:

> The life of the spirit flourished in New Jersey until the outbreak of the War of Independence. Not only were the inhabitants receptive to the new sects and the Great Awakening that swept through the colonies in the 1740s, but the older denominations had experienced a steady growth. In 1775 there were nearly two hundred congregations in the colony. The Presbyterians led with fifty, followed by the Quakers with forty, the Dutch Reformed and the Baptists with thirty each, and the Anglicans with twenty. Scattered among these were a few Swedish Lutheran, German Lutheran, and Moravian Pietist congregations, but the Methodists had barely appeared. Eighteenth-century New Jersey, with its diverse populace, was a fertile ground for the missionary. Since the stronger churches, the Presbyterian and the Dutch Reformed, strove to achieve an educated ministry and an educated laity and since the Quakers and the Anglicans also believed strongly in schooling, it is no surprise that the churches led in kindling the life of the mind as well as that of the spirit.[298]

It was this diverse Protestant worldview, in spirit and in mind, that made possible a settlement, reflected in the new constitution, that entailed no establishment of religion.

3. New York

A variety of factors influenced New York's approach to church-state relations. While various colonial officials under both Dutch and English governments made efforts to bolster the state church, the financial and social inconveniences that accompanied an established church were such that by 1777 New York would embrace both individual free exercise and voluntary support of all churches.

> principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.

Id. at 2597–98. It is apparent from the above articles that they were borrowed from different sources. Aside from the use of "colony" versus "province" in the text, Article XIX is more narrowly written to favor Protestants, whereas Article XVIII applies to a broad array of religious categories including Catholics, Jews, and Muslims. The borrowing from sister states resulted in a disharmony between the two articles.

298. POMFRET, *supra* note 280, at 218.

The Dutch settlers in their colony of New Netherlands were more concerned with profitable business than religion.[299] Nonetheless, Holland provided Dutch Reformed clergy for her colony,[300] while the reputation of New Netherlands for toleration drew religiously diverse immigrants from both Europe and New England.[301] In 1658, the intolerance of Governor Stuyvesant, demonstrated by his attempt to arrest all Quakers, was resisted by twenty-six freeholders of various religious affiliations in the Flushing Remonstrance.[302] By 1663, the resistance of the Dutch Reformed clergy to immigration of diverse sects had given way to

299. A HISTORY OF NEW YORK STATE 26 (David M. Ellis et al. eds., rev. ed. 1967). The editors add, "The company directors were unabashedly seeking profits. The settlers, reflecting the same secular spirit, were often rough and unruly characters who became notorious for their addiction to strong drink." *Id*.

300. MICHAEL KAMMEN, COLONIAL NEW YORK: A HISTORY 40 (Milton M. Klein & Jacob E. Cooke eds., 1975) ("Their ministers had to be obtained from Holland where there was a proper jurisdictional body, the Classis, to ordain them.").

301. S.D. MCCONNELL, HISTORY OF THE AMERICAN EPISCOPAL CHURCH FROM THE PLANTING OF THE COLONIES TO THE END OF THE CIVIL WAR 62 (4th ed. 1890). McConnell somewhat overstates this point when he writes:

> The Dutch had learned religious toleration in a hard school, and had learned their lesson well. In New York alone, of all the colonies, absolute religious liberty subsisted from the start. Even in Penn's colony no "Jew, Turk, Infidel, or heretic" might live. New York gave a home to everything that is human. There the Jew first set foot in America. Lutherans, Puritans, Presbyterians, Huguenots, and Quakers dwelt undisturbed. . . . Dutch, French, and English were spoken, each by so many that public documents [were] required to be in all three tongues.

Id. As explained in the text, there was in New York's early years nothing approaching "absolute religious liberty."

302. A HISTORY OF NEW YORK STATE, *supra* note 299, at 27. Sanford Cobb describes the Flushing Remonstrance, albeit with a slightly different date, as follows:

> [An order to arrest all Quakers] had been sent (1658) to [the village of] Flushing, in response to which the people of the town presented to the council a remonstrance, refusing to execute the law against the Quakers. "Therefore," they said, "if any of these persons come in love unto us, we can not in conscience lay violent hands upon them, but give them free Egresse and Regresse into our town and houses, as God shall persuade our consciences, and in this we are true subjects both of Church and State, for we are bound by the law of God and man to do good unto all men and evil to no man." This remonstrance was read to the council by the sheriff of Flushing, Tobias Feake, who was at once put in jail, whither Edward Hart, the clerk, was sent to keep him company. Feake was soon released, but Hart was kept three weeks. . . . Flushing was forbidden to hold town meetings without the special permission of the governor and council. Feake, who had added to his offence touching the remonstrance, that of "lodging some of the abominable sect called Quakers," was removed from the shrievalty and fined 200 guilders. Should he refuse to pay the fine, he was to be banished.

COBB, *supra* note 245, at 319.

pragmatism.[303] Religious toleration was already the preferred policy when in 1664 James II, then Duke of York, dropped anchor within sight of New Amsterdam and demanded Stuyvesant's surrender. The colony was promptly renamed New York.

The advent of English dominion over New York brought little change to the existing church-state arrangement until after the 1689 coronation of William of Orange, himself a Dutchman.[304] The Ministry Act of 1693 legally established the Church of England in the four counties of Richmond, Queens, Westchester, and New

303. KAMMEN, *supra* note 300, at 61–62. Johannes Megapolensis complained in 1655:

> For as we have here Papists, Mennonites and Lutherans among the Dutch; also many Puritans or Independents, and many Atheists and various other servants of Baal among the English under this Government, who conceal themselves under the name of Christians; it would create a still greater confusion, if the obstinate and immovable Jews came to settle here.

Id. Rebuffing this sentiment, the West India Company directed Governor Stuyvesant when it wrote:

> Your last letter informed us that you had banished from the Province and sent hither by ship a certain Quaker, John Bowne by name: although we heartily desire, that these and other sectarians remained away from there, yet as they do not, we doubt very much, whether we can proceed against them rigorously without diminishing the population and stopping immigration, which must be favored at a so tender stage of the country's existence. You may therefore shut your eyes, at least not force people's consciences, but allow every one to have his own belief, as long as he behaves quietly and legally, gives no offence to his neighbors and does not oppose the government.

Id. at 62.

304. MCCONNELL, *supra* note 301, at 63–64. McConnell explains:

> Colonel Nichols landed with his staff and his chaplain, bringing the English flag and the English Church. Their coming did not strikingly change the ecclesiastical situation. Colonel Nichols was himself a Churchman, but of a mild type. He made no attempt at propagandism. His own chaplain read prayers and preached in the little log chapel of Fort James alternately with the Dutch dominie, and, later on, the Roman Catholic priest. . . .
>
> It was not till 1690, after the Dutch Stadtholder had become the English King, that the Church began to grow. . . . The King spoke [Dutch] far better than he did English. He was a member of their Church as well as an Episcopalian. If their beloved Prince of Orange found it easy to be a Churchman, why should not they do likewise? . . . The only thing they boggled at was giving up their beloved Dutch tongue. They stood out against this, but in vain. The young people understood English, and grew to dislike their fathers' speech. They clamored for English in their services. When the elder people refused to allow it, the younger turned to the Church [of England].

Id.

York, all situated in what is modern-day New York City.[305] In 1697, a compromise proposed by Governor Fletcher led to the incorporation of Trinity Church (Anglican) in New York City and provided for its financial support. However, the Dutch Reformed congregations were exempt from assessments supporting Trinity Church.[306] In 1699, a bill for the tax support of all Protestant ministers was defeated.[307] However, a bill allowing, upon local option, general assessments for building and maintaining houses of worship, including those for dissenters, was enacted later that year.[308] One writer comments, "In effect, the colony's ecclesiastical solution for its pluralistic society was state support according to local option, plus a special requirement in the four lower counties that dissenters

305. KAMMEN, *supra* note 300, at 220. *But see* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d ed. 1994). Concerning the 1693 act, Levy writes:

> In effect, the act of 1693 seemed to have established the Anglican Church in the four localities named, but not a word in the act referred to that church. The statute called only for "a good and sufficient Protestant Minister" and specified no denomination. Royal governors and most Anglicans asserted that the statute had established the Church of England; many non-Anglicans in New York disagreed. The legislature that had passed the measure resolved in 1695, to the governor's wrath, that the act permitted a "dissenting protestant minister" to be called to a church within the geographic limits of the act, and "he is to be paid and maintained as the act directs." In other words, non-Anglican Protestants in the four localities could pay their taxes for the support of their own local church, and churches not of the Church of England were in fact built; they and their ministers were maintained by local taxation within the four localities after the act of 1693. . . .
>
> . . . .
>
> Finally, in 1731, the provincial court of New York decided the controversy in a case involving the Jamaica Church of Queens. The church had been built by a town tax as a Presbyterian edifice in 1699. . . . The Episcopalians then sued for possession, once more arguing that a publicly supported church could belong to none but the Church of England, and the Presbyterians lodged a countersuit. The court ruled in favor of the Presbyterians, allowing them to hold the church and collect taxes for its maintenance and for the salary of the minister.

Id. at 13–15 (footnotes omitted).

306. KAMMEN, *supra* note 300, at 221.

307. *Id.* Kammen writes, "When the Assembly adopted a bill in 1699 for the support of *all* Protestant ministers in New York, [Governor] Bellomont had it defeated in Council. His instructions did not allow him to accept any measure that might jeopardize the special status of the Church of England." *Id.*

308. *Id.* Kammen continues, "Dissenters did, however, obtain one concession in 1699. A bill went through that allowed towns to raise funds from general taxation for building and repairing meetinghouses. That act could be construed to permit construction of dissenting churches at public expense." *Id.*

there also pay taxes to aid an embryonic Anglican establishment."[309] Accordingly, New York was a colony with a general Protestant establishment, except for the four lower counties where the Church of England had legal claim to preeminence.[310]

In 1753, another clash between the Anglicans and Protestant dissenters arose over the charter of King's College (modern Columbia University).[311] Hoping to promote episcopacy in this religiously cosmopolitan colony, seven of the ten trustees of the college (all churchmen) proposed a charter that would grant control exclusively to the Church of England.[312] The opposition this time was mounted not by Dutch Reformers, but by an English Presbyterian, William Livingston,[313] who was one of three non-Anglican trustees.[314] Livingston published several articles in the

309. *Id.*

310. The establishment was "qualified" in that all Protestant churches could benefit from general taxation, but only for building and maintaining their houses of worship. The Church of England enjoyed full establishment in the four New York City counties, with exemptions for the native Dutch Reformed citizens. *Id.* at 221.

311. PATRICIA U. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 176 (1971) ("Another [disturbing influence] was the storm that arose in 1753 over the chartering of King's College.").

312. *Id.* at 176–77 ("Anglican leaders hoped to establish the college 'upon a Foundation, that may give a Prospect of promoting religion in the way of the National Ch[urch],' and seven of the ten trustees were members of the Church of England.") (alteration in original) (footnote omitted).

313. The following portrait of Livingston is presented in the introduction of a volume of his collected papers:

> In politics, Livingston usually operated as a factional leader rather than an elected official. He sat in the New York Assembly for two years, but only as representative from the pocket borough of Livingston Manor. The protracted political battles between the faction led by Livingston, John Morin Scott, and William Smith, Jr., and that of the De Lancey family and its lieutenants had been the major political theme in the province of New York for decades. Livingston and his supporters controlled the New York Assembly from 1758 to 1768. The "New York Triumvirate," as Livingston, Scott, and Smith were known, took part in a movement opposing the charter of King's College (now Columbia University) and the expansion of Anglican influence in church and state. Livingston's rise as a political leader received its greatest impetus from his vociferous defense of American religious liberties. As a Presbyterian defender of American religious pluralism, he became well known through his newspaper essays, which contained rhetorical appeals to the dissenters in the colony.

1 THE PAPERS OF WILLIAM LIVINGSTON 4 (Carl E. Prince et al. eds., 1979) (footnote omitted).

314. BONOMI, *supra* note 311, at 177 ("When the Anglicans' intentions became known, William Livingston, also a trustee but a leading Presbyterian, launched a crusade to assure that the college would be controlled by no single denomination.").

Independent Reflector[315] explaining both the imprudence of such an arrangement and the religious mischief it might cause.[316] While

315. *Id.* Livingston's involvement with the *Independent Reflector*, as well as other means of public instruction and communication, is described by Bonomi as follows:

> Livingston's effort relied heavily on the printed word, especially the *Independent Reflector*, a New York City periodical established by him in company with William Smith, Jr., and John Morin Scott. This "triumvirate" of literary lawyers also addressed public meetings, circulated petitions in the outlying counties, and, in the words of the eighteenth-century historian Thomas Jones, put the whole province into a "ferment," as "presbyterian pulpits thundered sedition, and every engine was set at work. . . ."

Id.

316. The following excerpts from Livingston's essays provide the gist of his arguments:

> Tho' Academies are generally Scenes of Endless Disputations, they are seldom Places of candid Inquiry. The Students not only receive the Dogmata of their Teachers with an implicit Faith, but are also constantly studying how to support them against every Objection. The System of the College is generally taken for true, and the sole Business is to defend it.

WILLIAM LIVINGSTON, THE INDEPENDENT REFLECTOR 174 (Milton M. Klein ed., 1963).

> It is in the first Place observable, that unless its Constitution and Government, be such as well admit Persons of all protestant Denominations, upon a perfect Parity as to Privileges, it will itself be greatly prejudiced, and prove a Nursery of Animosity, Dissention and Disorder. The sincere Men of all Sects, imagine their own Profession, on the whole, more eligible and scriptural than any other. It is therefore very natural to suppose, they will exert themselves to weaken and diminish all other Divisions, the better to strengthen and enlarge their own. . . . Should our College, therefore, unhappily thro' our own bad Policy, fall into the Hands of any one religious Sect in the Province: Should that Sect, which is more than probable, establish its religion in the College, shew favour to its votaries, and cast Contempt upon others; 'tis easy to foresee, that Christians of all other Denominations amongst us, instead of encouraging its Prosperity, will, from the same Principles, rather conspire to oppose and oppress it.

Id. at 178.

> Another Argument against so pernicious a Scheme is, that it will be dangerous to Society. . . . That religious Worship should be constantly maintained there, I am so far from opposing, that I strongly recommend it, and do not believe any such Kind of Society, can be kept under a regular and due Discipline without it. But instructing the Youth in any particular Systems of Divinity, or recommending and establishing any single Method of Worship or Church Government, I am convinced would be both useless and hurtful. Useless, because not one in a Hundred of the Pupils is capable of making a just Examination, and reasonable Choice. Hurtful, because receiving Impressions blindly on Authority, will corrupt their Understandings, and fetter them with Prejudices which may everlastingly prevent a judicious Freedom of Thought, and infect them all their Lives, with a contracted turn of Mind.

Id. at 180.

> The Legislature to whom it owes its Origin, and under whose Care the Affair has hitherto been conducted, could never have intended it as an Engine to be exercised for the Purposes of a Party. Such and Insinuation, would be false and

Livingston and his colleagues lost the battle over the divinity school and Anglican control of the college, the charter did not allow for public funds to support the college[317] and, more importantly, a dissenter's case for religious freedom made in the *Independent Reflector* was widely circulated.[318]

In spite of periodic attempts either to impose new hardships on dissenters or to extend support for the Church of England, the New York colony, dissenters in particular, became accustomed and comfortable with the tax support, upon local option, for their church buildings. Where the local option was not invoked, church support was of course voluntary.[319] Religious toleration began to spread to other issues. In 1734, as a result of the Cosby-Van Dam controversy, Quakers won full acceptance over against the prejudices of several royal governors.[320] Likewise, Jews were granted the right of

> scandalous. It would therefore be the Height of Insolence in any to pervert it to such mean, partial and little Designs. No, it was set on Foot, and I hope will be constituted for general Use, for the public Benefit, for the Education of all who can afford such Education: And to suppose it intended for any other less public-spirited Uses, is ungratefully to reflect upon all who have hitherto, had any Agency in an Undertaking so glorious to the Province, so necessary, so important and beneficial.

Id. at 181. The above excerpts are a small sampling of the arguments presented in a series of weekly articles beginning with Number XVII, March 22, 1753, and continuing to Number XXII, April 26, 1753. *Id.* at 171–214.

317. BONOMI, *supra* note 311, at 177 ("The college was eventually chartered and placed under Anglican direction, though without the support of public funds, and by the end of 1756 the controversy was fading.").

318. *Id.* ("But if Livingston could claim only a partial success, [Governor] DeLancey himself was not entirely unaffected by 'the breaches upon his popularity without doors.'" (footnote omitted)).

319. KAMMEN, *supra* note 300, at 239. Kammen quotes a Dutch Reformed pastor from 1738 as follows:

> We enjoy the free exercise of our religious services in every respect, although there is not the least provision made for our Church by the Civil Authorities. Hence, mutual affection, and unity in faith and piety . . . are the only means of preserving our Christian churches, and of making them flourishing and prosperous.

Id. This sentiment is indicative of the contagious nature of voluntaryism among colonists. The novelty of voluntary support for religion accounts for the hesitant, half-way policies that allowed state support to continue as an option. By 1738, when the above quote was recorded, New York was beginning to identify the positive effects of voluntaryism and the exercise of the optional assessment for building maintenance was neglected. *Id.* at 238–39.

320. *Id.* at 239–40 ("A reversal [of Quaker fortunes] finally came in 1734 as a result of the Cosby-Van Dam controversy. . . . [I]n 1734 the Assembly finally settled the matter by deciding that 'the legislation of New York should conform as near as possible to that of England,' and it passed a bill giving the New York Friends the same status as English Quakers. Cosby gave his reluctant approval, and thereafter Quakers could vote without being challenged in New York.").

naturalization in 1718, full suffrage in 1727, and in 1731 dedicated the first synagogue built in the British colonies.[321] Because citizenship was required in order to hold title to real estate, naturalization was an important advancement in religious toleration. Jewish suffrage was temporarily suspended in 1737,[322] but was recovered between 1748 and 1761,[323] and guaranteed, along with Roman Catholic suffrage, in the New York constitution of 1777.[324] It was the 1777 constitution that brought about the complete freedom of religious exercise and the disestablishment of all religious institutions.[325]

The Cosby-Van Dam controversy began as a dispute between Governor William Cosby and Rip Van Dam, the head of the Council, concerning Van Dam's collection of the governor's salary during the period between the death of the previous governor and Cosby's arrival. When the governor created equity jurisdiction in the Supreme Court so as to avoid a jury in the ensuing suit, Chief Justice Lewis Morris surprised him by attacking the constitutionality of the newly created jurisdiction. Cosby then fired Morris, effectively creating two factions within the colony. After Morris won a seat in the election of 1733, supported by Quakers who approved of his tolerance toward dissenters, the Council finally granted the same privileges to Quakers in New York that English Quakers already enjoyed, i.e., the right to vote. *Id*. at 239–41.

321. *Id*. at 240.

322. *Id*.

323. *Id*.

324. N.Y. CONST. of 1777, *reprinted in* 5 CONSTITUTIONS, *supra* note 230, at 2623, 2632, 2636. Article XIII states that a citizen may only be disenfranchised "by the law of the land, or the judgment of his peers." *Id*. at 2623, 2632. Article XXXVIII then states:

> And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

Id. at 2623, 2636–37.

325. *Id*. at 2623, 2636. While Article XXXVIII effectively provided reasonably unfettered religious liberty and embraced voluntaryism within the State of New York, a few other articles are of interest. Article VIII specifically provided Quakers with the right to give an affirmation instead of an oath when voting. *Id*. at 2623, 2631. Article XXXV adopted the Laws of England up to the date of the formation of the state with the exception of the English ecclesiastical laws. *Id*. at 2623, 2635–36. Article XXXIX forbade clergymen from holding public office so as not to distract them from their calling, while Article XL empowered the state to maintain a militia from which Quakers were exempt. *Id*. at 2623, 2637.

4. North Carolina

The history of the Church of England in this lightly populated southern colony is more one of a failed establishment than it was an establishment lost as the result of a political contest.[326] For want of an adequate number of Anglican clergy[327] and church buildings,[328] in

326. On this theme, Leonard Levy opines:

> Every one of the five [southern] states disestablished the Anglican church but only North Carolina showed no temptation to create a general establishment that taxed people only for the church of their choice. By its constitution of 1776 North Carolina became the first southern state to separate church and state. Indeed, North Carolina did so easily, in contrast to the other southern states. . . . In North Carolina the Anglicans maintained what one historian called "the most unhealthily established church in the American Colonies."

LEVY, *supra* note 305, at 46 (footnote omitted).

327. Spencer Ervin, *The Anglican Church in North Carolina*, 25 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 102 (1956). According to Ervin:

> When the Rev. John Blair reported to the [Society for the Propagation of the Gospel] in January 1704, there were no clergymen in the province but himself, and he would not stay because of the lack of any local provision for a salary.
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> . . . .
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> . . . By the end of 1732, the colony was again without any clergy, except for La Pierre in the extreme south. . . .
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> . . . .
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> . . . The end of March 1762 Governor Dobbs reports seven men on duty, and two years later, six. . . .
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> . . . .
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> . . . But there remained, at Tryon's departure [1771], eighteen.
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> . . . .
>
> . . . In the whole forty-seven [who served between 1700 and 1776], there were five definitely bad characters, and another four may have been of this description. On a percentage basis, the maximum of undesirables was about one-fifth; the minimum about one-ninth.

Id. at 143, 145–46, 147, 148, 149.

328. *Id.* at 142. Ervin also reports:

> [T]he want of church buildings was a handicap.
>
> . . . [W]hen Governor Dobbs arrived in November 1754, he found "not above one Church roofed and seated in the Province." Ten years later, in 1764, he told the legislature that there were then not above three or four churches finished fit for divine service. In 1765, his successor, Tryon, listed one church in good repair, two others wanting considerable repairs, and two under construction; there were, however, he said, two, three, or four chapels in each county, served in some instances by a lay reader. . . . The net result may have been seven churches complete and useful when Tryon departed in 1771, although the notices are too indefinitely worded for certainty.

Id.

addition to the significant presence of dissenting Protestants[329] (especially Presbyterians and Baptists), over time the Anglican church became little more than a paper establishment.[330] In the period 1765 to 1771, attempts by William Tryon, the royal governor, to strengthen the establishment only served to reinforce the resistance of dissenters.[331] Concerning the actions of the governor, one historian writes:

> [In] differentiating between the two [churches] he produced two reactions—one of political cohesion among Presbyterians which enabled them to write the actual disestablishment laws, and one of resentment toward the Crown which fostered a spirit of democracy among the Baptists. These factors, born in a tradition of local autonomy, fueled with the enthusiasm of the Great Awakening,

329. Gary Freeze, *Like a House Built upon Sand: The Anglican Church and Establishment in North Carolina, 1765–1776*, 48 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 405 (1979). Concerning the Presbyterians, Freeze says:

> The Anglican itinerant Charles Woodmason in 1765 compared the effect of Presbyterian settlements in the Carolinas to that of French outposts along the frontier during the Seven Years War. Where the French tried to halt the spread of British westward settlement, the Presbyterians hampered the rise of the Anglican establishment. . . . By the time of the Revolution the Presbyterians provided a cogent coalition of dissent for the ultimate disestablishment of the church.

Id. at 412–13. Freeze records the following concerning the Baptists:

> The fiercely devout and independent Baptists disrupted Tryon's plans for a smooth structuring of provincial society. Consequently, the governor treated them with disdain and at times with tyrannical oppression. Such treatment, far from the conciliatory gestures he made to the Presbyterians, sparked a deep resentment among Baptists for Crown authority. . . .
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> . . . .
>
> . . . [T]he very presence of the Baptists and the democratic form of religion they championed provided a spirit of resentment that hindered Tryon's efforts to bolster the Anglican Church. A socially-leveled Baptist community was the antithesis of the structure Tryon desired. In that way Baptists were the most dissenting of all the sects.

Id. at 419, 423.

330. *Id.* at 428. In the words of Freeze:

> Establishment, politically a dead letter, needed only to be blotted from the law books. "The church establishment seems to have had so few friends that, in changing government it was hardly noticed," noted Carruthers. Anglican interests, which had sought autonomy for years, had little to lose in the disestablishment of a nearly defunct church. Dissenters, particularly Baptists, had much to gain, for their doctrines would enjoy legal and social acceptance. Thus, the conservative Anglicans could easily give in to any dissenter position, obtaining support for patriot government in return.

Id.

331. *Id.* at 430–31.

> and nurtured by the political controversies leading to the Revolution assured the end of establishment.[332]

The North Carolina constitution of 1776 dispelled the illusion of an Anglican establishment and left only a theoretical general establishment—albeit, decidedly Protestant—in its place.[333] The new settlement expressly guaranteed that government would favor no particular Protestant denomination,[334] but it also excluded Catholics and non-Christians from participation in the government.[335] The general establishment, while existing on paper, was never enforced. Thus the gradual decline and eventual fall of the Church of England

332. *Id.* at 431.

333. LEVY, *supra* note 305, at 53–54. Levy explains:

> [I]n 1776, the new state constitution banned the "establishment of any one religious church or denomination in this state, in preference to any other." This language, which seemed directed against an exclusive establishment only, applied to even a nonpreferential one, because the next clause of the same section provided that "neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship, contrary to his own faith or judgment, nor be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all Protestants shall be at liberty to exercise their own mode of worship." The phrasing against preference reflected the state's colonial experience with an exclusive establishment, not an authorization to support religion nonpreferentially. North Carolina never granted financial aid to religion after 1776.

Id. (footnote omitted).

334. N.C. CONST. of 1776, *reprinted in* 5 CONSTITUTIONS, *supra* note 230, at 2787, 2787–99. Article XXXIV of the 1776 constitution states:

> That there shall be no establishment of any one religious church or denomination in this State, in preference to any other; neither shall any person, on any pretence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship:—*Provided*, That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.

Id. at 2787, 2793.

335. *Id.* Article XXXII of the 1776 constitution reads:

> That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.

Id.

in 1776 was de facto the beginning of voluntaryism in North Carolina.

5. Maryland

After a failed attempt to settle a portion of the island of Newfoundland,[336] George Calvert (first Lord Baltimore)[337] asked Charles I for title to the lands just north of the Potomac River.[338] Calvert envisioned this acquisition serving the twin objectives of financial venture and safe harbor for Calvert's fellow Catholics.[339] In 1632 the request was granted posthumously,[340] and his son, Cecilius

336. George Calvert bought an interest in the Colony of Newfoundland in 1620. The following year he financed a settlement which he called Ferryland, and after an additional two years he received a patent from Charles I granting him the entire southeast coast of the island. He named this new venture "Avalon." Calvert then resigned from his post as Secretary of State and visited his lands in the new world during two summers. Finding the climate intolerable, Calvert then began his campaign for property further south near Virginia. AUBREY C. LAND, COLONIAL MARYLAND: A HISTORY 4–5 (Milton M. Klein & Jacob E. Cook eds., 1981).

337. The impetus for Calvert's resignation as Secretary of State was the public declaration of his conversion to Catholicism. James I responded by raising Calvert to the Irish peerage as the Baron of Baltimore. *Id.* at 5.

338. *Id.*

339. *Id.* at 8–9. Land explains the Calverts' motives as follows:

> The mystery surrounding the composition and embarkation of the expedition lends strength to the argument that Lord Baltimore founded his colony of Maryland as a refuge for his persecuted coreligionists. Certainly, the lot of Roman Catholics was unhappy in the England of Charles I. Successive editions of Foxe's *Book of Martyrs* (1563–1593) kept fresh in England the memories of the burning of Protestants under Queen Mary and gave incentive to zealous enforcement of the Elizabethan penal laws against Catholics. In public sentiment and in the eyes of the law, Roman Catholics were objects of suspicion and discrimination. Without doubt Cecilius, Lord Baltimore, wished to insure that Catholics in Maryland would be spared the discrimination they had suffered in England. But the whole pattern of his conduct, and his father's before him, resembled that of other colonial promoters of the day; he wrote constantly of profits and loss and of the prospects for future gain. He assuredly did not wish religious dissension to jeopardize the expedition, and he bade his brother Leonard, designated governor, to "cause all Acts of the Romane Catholique Religion to be done as privately as may be and . . . [to] instruct all the Roman Catholiques to be silent upon al[l] occasions of discourse concerning matters of Religion." On the evidence a clear statement of Lord Baltimore's motives is not possible. Doubtless the religious haven figured in his thinking. Unquestionably too, he had in mind the enhancement of his family estate. The fairest statement of his motivation would include both.

Id.

340. The charter received the Privy Seal just days before George Calvert's death on April 15, 1632. The final grant, naming Cecilius Calvert as grantee, was given the great seal of the realm on June 20, 1632. *Id.* at 6.

Calvert, took up his father's vision.[341] The Calvert family ties to Charles I caused difficulties during the period of civil war between the King and Parliament and the resulting Interregnum.[342] In 1689, the Glorious Revolution brought a change in government to both England and Maryland. The coronation of William and Mary emboldened political dissidents in Maryland who toppled the Baltimore palatine, and ushered in a quarter century of royal control.[343] The Calvert family regained governance of their colony only after joining the Church of England,[344] remaining in power until the War of Independence.

The original 1632 grant to Cecilius Calvert is interesting with respect to religious establishment. While the language of the patent appears to indicate an establishment of the Church of England,[345]

341. Concerning the younger Calvert's commitment to his father's legacy, Scharf writes, "On the death of Lord Baltimore, his eldest son, Cecil Calvert, succeeded to his honors, his fortunes and his spirit. 'Treading in the steps of his father,' the phrase used by the king, is not here the language of empty compliment." 1 J. THOMAS SCHARF, HISTORY OF MARYLAND: FROM THE EARLIEST PERIOD TO THE PRESENT DAY 53 (1967).

342. Robert Brugger provides a sample of the ferment during these troubled times:

> For nearly twenty years in the middle of the century, a period the settlers later referred to as a "time of troubles," Maryland suffered the full consequences of English political and religious warring and its own weak political structure. Lord Baltimore found the time personally difficult. His wife, Lady Anne Arundel, daughter of a leading Catholic member of Lords, died in 1639. In the next few years Calvert must have wished he himself were free to seek refuge in Maryland. Parliament convened in 1640, challenged royal absolutism, and charged some of King Charles' advisors with counseling tyranny and treason against the English people. The House of Commons executed a longtime Yorkshire friend of the Calverts, Thomas Wentworth, Earl of Strafford, in 1641. In August 1642 the king defied Parliament and took his cause to the battlefield. During the ensuing civil war Charles and his royalist or Cavalier friends enlisted the help of Scots Presbyterians and Irish Catholics in the struggle against Cromwell's forces, while the Puritan or "Roundhead" Parliament showed a willingness to deal with its enemies as it did with Charles, who was beheaded in early 1649. Politics and conscience had so combined as to leave Calvert's every move suspect; in the Puritan order his tolerant province was more anomalous than ever.

ROBERT J. BRUGGER, MARYLAND, A MIDDLE TEMPERMENT: 1634–1980, at 18 (1988).

343. LAND, *supra* note 336, at 87–90. In 1689, a political assault led by John Coode and reinforced by a piecemeal militia, initiated the rebellion. Coode accepted the surrender of William Digges, kinsman of the Calverts by marriage, on July 27, without a shot fired. The last resistance of the proprietary government was overcome on August 1. *Id.*

344. 1 SCHARF, *supra* note 341, at 380–81.

345. The charter reads:

> [T]he PATRONAGES and ADVOWSONS of all churches which (with the increasing worship and religion of CHRIST), within the said region, islands, islets and limits aforesaid, hereafter shall happen to be built; together with license and faculty of

Calvert interpreted it differently.[346] Reading the grant as an analogy to the authority of the English king, Calvert believed that the power to declare ecclesiastical law and establish a particular church rested completely in his discretion.[347] However, with the power to entrench the Roman Church within his reach, the second Lord Baltimore chose instead to extend religious tolerance.[348]

> erecting and founding churches, chapels and places of worship, in convenient and suitable places, within the premises, and of causing the same to be dedicated and consecrated *according to the ecclesiastical laws of our kingdom of* ENGLAND; with all and singular such, and as ample rights, . . . and temporal franchises whatsoever, as well as by seas as by land, within the region, islands, islets and limits aforesaid, to be had, exercised, used and enjoyed, as any bishop of Durham, within the bishoprick or county palatine of Durham, in our kingdom of England, ever heretofore hath had, used or enjoyed, or of right could, or ought to have, held, use or enjoy.

Id. at 54 (emphasis added).

346. COBB, *supra* note 245, at 364 ("Baltimore construed the charter as conferring ecclesiastical supremacy on the proprietary, which he was to exercise according to those laws.").

347. Cobb explains:

> This is to say, as those laws made the king head of the English Church, the charter made Baltimore head of the Maryland Church. It did not specifically tell him to conform the Church of Maryland to the English model, but left it in his hand to do as he wished and as he found what Church he desired. Under the terms of the charter it was competent for him to establish Romanism, Episcopacy, Independency, or Presbyterianism. The power of establishment is plainly in the instrument, but its character is undefined.

Id.

348. An example of this self-restraint is recorded by Scharf when he writes:

> Lord Baltimore was also authorized to hold "the patronages and advowsons of all churches which (with the increasing worship and religion of CHRIST) happen to be built, together *with license and faculty* of erecting and founding churches and chapels, etc., and of causing them to be dedicated and consecrated according to the ecclesiastical laws of our kingdom of England." A mere power to do so, not an obligation on the part of Lord Baltimore to comply with it. . . . Now, when some forty-four years after the settlement, the Episcopal clergy of the province petitioned the government against the proprietary, and demanded a *provision* for themselves, because the Catholic clergy held lands for their support, Lord Baltimore replied that the Catholic clergy had obtained their lands as other settlers had done, under "the conditions of plantations." He was advised by the Board of Trade and Plantations to provide the Episcopal clergy with a public support. He refused to do so, for no other clergy in the province had received it, and so the matter ended. Now if the English church in Maryland had secured the rights it possessed under the English law, it would have had its tithes and its glebes, and Lord Baltimore could not have protected himself from the claim as he did, and under the royal charter to his ancestors. This was changed afterwards, and under Protestant rule the English church was established by act of assembly, glebe lands provided, and tithes levied upon men of all religions or none, to support its clergy.

The year 1688 began the period in which the Calvert family would lose control of their colony.[349] The newly crowned William of Orange appointed a royal governor over Maryland. Lionel Copley took up the new post in 1692, and his second order of business was to establish the Church of England.[350] A period of intense anti-Catholicism followed the proclamation of Anglican supremacy.[351]

In 1715, George I reinstated the fifth Lord Baltimore as proprietor who then governed through his guardians.[352] This was

1 SCHARF, *supra* note 341, at 157–58. It must also be admitted that open support of the Catholic Church in the English colonies would have posed political difficulties that the Calverts had every reason to avoid. While the record tends to present the Lords Baltimore as atypically gracious in ecclesiastical matters, pragmatism played as significant a role as principle.

349. *Id.* at 342. According to Scharf, William pressured the current Lord Baltimore to surrender his charter. Baltimore refused, believing his family had faithfully abided by the charter and had not abused the incredible discretion which it granted. Failing to obtain Baltimore's voluntary abdication, William appointed Lionel Copley as the first royal governor of Maryland on August 26, 1691. After some discomfort within the administration concerning the legality of this act, the King's commission received the Privy Seal and Copley set sail for Maryland. *Id.*

350. *Id.* at 343. Scharf writes:

> The first act passed by the Assembly was one recognizing the title of William and Mary; a formal recognition in which Maryland was joined by but one other province—New York. The next was an act making the Church of England the established church of the province, and thus putting an end to that equality in religion which had hitherto been Maryland's honor. It provided for the division of the ten counties into thirty-one parishes, and imposed a tax of forty pounds of tobacco upon each taxable person, as a fund for the building of churches and the support of the clergy.

Id.

351. MCCONNELL, *supra* note 301, at 55. McConnell relates from an Anglican point of view:

> [Maryland's] charter was revoked in 1690, like those of Massachusetts and New York, in pursuance of the home policy which had determined to bring the colonial territory out of its anomalous political status, and restore it to its place as a part of the common possessions of the kingdom. By this act of the Crown,—not the colonists themselves,—the ecclesiastical balance was overturned. The people came back under English law. By that law the Romanist as such was proscribed. His very existence became treason. By the same law the English Church was part of the machinery of the realm. It needed no new statute for either. The existing laws sufficed. The Church of England was now the established Church of Maryland.

Id. For a decidedly Catholic perspective on these events, see J. MOSS IVES, THE ARK AND THE DOVE: THE BEGINNING OF CIVIL AND RELIGIOUS LIBERTIES IN AMERICA 253–59 (1936).

352. 1 SCHARF, *supra* note 341, at 380–81. Scharf's account follows:

> Benedict Leonard survived his father scarcely long enough to be formally recognized as proprietary; and by his death, on the 5th of April, 1715, his title and rights devolved upon his infant son, Charles Calvert, who was now being brought

possible only because the Calvert family had rejoined the Church of England.[353] While the return of the proprietorship raised local Catholic hopes,[354] Protestant forces were still firmly in control of the colonial government.[355]

up as a Protestant. The pretext for the suspension of the proprietary government having now ceased to exist, Francis, Lord Guilford, the guardian of Charles, petitioned for its restoration; and the king, "to give encouragement to the educating of the numerous issue of so noble a family in the Protestant religion," restored the government of the province to the infant proprietary, the Fifth Lord Baltimore. The administration was immediately assumed in his name, by his guardian, and a new commission, dated May 30, 1715, issued in both their names, continuing Captain Hart as governor.

Id.

353. *Id.* at 379. Scharf provides the contents of a memorial dated February 2, 1714, from Benedict Leonard Calvert to King George I announcing Leonard's return to the Church of England. The letter reads, in pertinent part:

> The humble petition of Benedict Leonard Calvert, son of Charles Lord Baltemore, sheweth—
>
> That he having for some years expressed to severall his Inclinations to become a member of the Church of England, determined in November, 1713, to declare himself so, and accordingly soon after publicly renounce the Romish Errors, and received from the hands of the Bishop of Hereford the blessed Sacrament of the Lord's Supper, in the Church of St. Anne Westminster.
>
> . . . .
>
> That yor Petr having severall times taken all the Oaths to the Government as well as the Sacrament in the Church of England, & having always demeaned himself with the utmost Duty & affection towards yor Majesty & Government,
>
> Therefore humbly prays, that yor Majty will be graciously pleased to continue his Pension, for the support of his children, during his Fathers life . . . .

Id.

354. BRUGGER, *supra* note 342, at 56. Brugger's portrait of this restoration follows:

> The plight of the Quakers and Catholics did not improve, as they thought it might, when in 1715 old Lord Charles died and King George I suddenly returned full proprietary privileges to Benedict Leonard Calvert, fourth Lord Baltimore and an Anglican convert. He died soon thereafter, and the guardians of his eldest son and successor, Charles (a sixteen year old), spurned the Friends' recommendation that he restore their political freedom. Governor Seymour's successor, John Hart, remained in office for five years after the Calverts' restoration and, like Seymour, believed Catholic plots pervasive in the colony. . . . Indeed, Darnall having died, Carroll had fallen heir to Baltimore's chief offices in the colony. Carroll's dispatch in collecting proprietary fees, fines, and taxes—and his refusal to take the Oath of Supremacy—pushed Hart over the edge. In 1718 the governor asked for, and the assembly readily passed, an act depriving all unsworn Catholics of the vote. The ideal of toleration lay in ruins.

Id.

355. The Royal Governor, John Hart, kept an uneasy watch over the Catholic response to the restoration of the proprietorship. Scharf records:

> Notwithstanding the comfortable assurances of Governor Hart, the restoration of the proprietary government was the signal for alarm in the province, which was

When the American colonies declared independence in 1776, Maryland adopted its first constitution. Article XXXIII of the Declaration of Rights granted freedom of conscience to all Christian citizens,[356] but it also empowered the legislature to enact assessments to be paid to the Christian church designated by each payer of the tax.[357] The constitution thus provided for a general establishment.

> increased by the foolish conduct of a few over-zealous Catholics in Annapolis, who, after drinking the health of the pretender [James II's son] and the new Lord Proprietary, "took the government guns down to the fort and fired a salute." These things caused serious uneasiness among the Protestants, who dreaded the establishment of the pretender's power in the colony; and at the first session of assembly, held under the restored government at Annapolis, on the 17th of July, 1716, an act was passed, which introduced the qualifying test oaths of England in all their rigor, and effectually excluded the Catholics from all participation in the government. In the preamble to the act they say "that nothing can be more effectual to secure to his lordship the quiet and peaceable enjoyment of his government, than the easing of the minds of the people, by having their religion, liberty and property secured, which has of late been daringly threatened by persons disaffected to the Protestant succession, who have openly, in treasonable manner, taken upon them to give the pretended Prince of Wales the title of King of Great Britain, and drunk his health as such." . . . The oath of abjuration consisted in abjuring the claims of the pretender, and declaring "King George" to be the "lawful and rightful King of the Realm of Great Britain, and all other Dominions and Countries thereunto belonging." They were also required to declare "That I do believe that there is not any transubstantiation in the Sacrament of the Lord's Supper, or in the Elements of Bread and Wine, at or after the Consecration thereof, by any person whatever." None were capable of holding offices or places of trust who refused to take these tests; and in case of such refusal, if the person refusing attempted to hold or exercise any such office, his commission or appointment was declared void, and he himself subjected to a fine of two hundred and fifty pounds sterling.

1 SCHARF, *supra* note 341, at 382–83.

356. MD. CONST. of 1776, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1686, 1689. This article begins by stating:

> That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry[.]

Id.

357. *Id.* ("[Y]et the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of

Additionally, the article declared all glebes then possessed by the Church of England to be in its rightful possession,[358] and all laws enacted by the legislature concerning religious taxes were to remain in effect until such time as superceded or repealed.[359]

In the early 1780s, attempts by parishioners of the Church of England to invoke the power to levy a religious assessment were beaten back by other Protestants.[360] Thus, by 1785 there was de facto disestablishment, albeit the theoretical possibility of religious assessments remained the letter of the law.

worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county[.]").

358. *Id.* at 1686, 1689 ("[B]ut the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England forever.").

359. *Id.* at 1686, 1689 ("And all acts of Assembly, lately passed, for collecting monies for building or repairing particular churches or chapels of ease, shall continue in force, and be executed, unless the Legislature shall, by act, supersede or repeal the same[.]").

360. *See* ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION: 1775–1789, at 431 (Augustus M. Kelley Publishers 1969) (1924). Nevins writes:

> It is evidence of the sentiment against any connection between church and state in Maryland that but one serious effort was made to give effect to this power. After the peace, petitions began to come from certain vestries lamenting a decline in piety and morals; and the legislature early in 1785 laid a bill providing for a general church tax before the people. A huge uproar arose against the measure, which was denounced by some as a preliminary step towards a new Establishment. Great numbers, it was said, would scruple in conscience to pay it; the tax might be raised from four shillings to twenty-four. That fall it was decisively beaten.

Id. (footnotes omitted). Likewise, Leonard Levy relates:

> A proposal of 1780 to impose an "equal assessment and Tax" for the benefit of religion got nowhere. In 1783 the governor urged a measure "placing every branch of the Christian Church upon the most equal and respectable footing." In 1784 another such bill proposed a tax for the aid of all Christian churches with preference to none; the bill exempted from the tax anyone professing to be a "Jew or Mohometan, or [declaring] that he does not believe in Christian religion." A Baltimore newspaper, seeing the "camel's nose" under the tent, censured the proposal as the reintroduction of an establishment. The legislature favored the bill but decided to leave its fate to the voters in their selection of representatives to the next legislative session. A blizzard of newspaper articles and petitions condemned the bill as a new establishment of religion and a violation of the Christian spirit, asserted that establishments harmed religion, and darkly warned about an Episcopalian conspiracy to retain supremacy. Opponents of the bill also argued that compulsory support of religion violated religious freedom. The voters chose a legislature strongly opposed to a general assessment, because additional taxation for any purpose triggered public hostility. In 1785 the bill was voted down by a two-to-one majority.

LEVY, *supra* note 305, at 54–55 (footnotes omitted) (alteration in original).

Maryland repealed the power of religious taxation in an 1810 amendment to this constitution.[361] A religious test oath for holding office remained a part of the Maryland constitution through two subsequent constitutions[362] and was finally struck down as unconstitutional by the United States Supreme Court in 1961.[363]

6. South Carolina

Early attempts were made in South Carolina to establish and sustain the Church of England.[364] It was not until 1704 that the Anglican Church was given tax support by statute, but with a few contentious strings attached.[365] The resulting controversy, waged

361. MD. CONST. of 1776, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1686, 1705. The amendment ratified in 1810 deals with religious taxes in Article XIII and reads, "That it shall not be lawful for the general assembly of this State to lay an equal and general tax, or any other tax, on the people of this State, for the support of any religion." MD. CONST. of 1776, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1686, 1705.

362. MD. CONST. of 1851, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1712, 1715. Article XXXIV required either "a declaration of belief in the Christian religion" or a statement of belief in "a future state of rewards and punishments" for Jewish officers. *Id*. The constitution of 1867 further limited the test oath to simply "a declaration of belief in the existence of God[.]" MD. CONST. of 1867, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1779, 1782.

363. *See* Torcaso v. Watkins, 367 U.S. 488 (1961). This suit was brought by Roy Torcaso after he was denied a notary commission for his failure to declare his belief in the existence of God.

364. 20 ELIZABETH H. DAVIDSON, THE ESTABLISHMENT OF THE ENGLISH CHURCH IN CONTINENTAL AMERICAN COLONIES 58 (1936). Davidson reports:

> The early governors [of South Carolina] were instructed to put as much of the Fundamental Constitutions into effect as they could. The ninety-sixth article of the draft of this document which was sent out to the colony required the building of churches and the maintenance of ministers of the Church of England at public expense. There seems to have been little action taken in this regard in the earlier settlements, but in 1680 the main settlement was made on Oyster Point and became known as Charles Town. The town was regularly laid out, and space reserved for a church. A structure was built known as the English Church, or St. Philip's. It is not known exactly when the first minister came to the colony, but a Reverend Atkin Williamson was there by 1680 or 1681.

Id. (footnotes omitted).

365. The two acts of the Assembly in 1704 were inspired by a faction of the Church of England that sought to prevent nonconformists from holding public office. The first act required all assemblymen to receive communion from the Church of England and take the oaths of allegiance required by William and Mary. The second demanded, inter alia, that only Anglican churches receive public support. *Id*. at 59–63. In outlining the contentious points in the acts, Davidson writes:

> This act shows radical differences from the customs of England. While requiring conformity in the forms of worship, it did not make provision, as was the

mainly between fellow Anglicans,[366] resulted in the statute's repeal.[367] The year 1706 brought another act of establishment, although the objectionable elements of its predecessor were omitted.[368] Thus, the Church of England enjoyed tax support throughout most of the eighteenth century, and this while its parishioners were outnumbered by dissenters in the colony.[369]

case in other colonies, that the ministers should be certified by the Bishop of London. It provided for the selection of the rector of the parish by a vote of the parishioners, a thing never done in England and rarely in the other colonies. The electorate for vestrymen was limited to the conformists, while such levies as were made were on all inhabitants. The support of the church was not based primarily on such taxation, however; it was to come first from gifts and thereafter from the parish. This levy was not to be a poll tax, but a rate in proportion to the tax levied by the civil government. The salary of the minister was paid by the government, a departure from both the English and the Virginia system. But the provision which raised the most opposition from the church itself was that [of] allowing the commission to exercise judicial authority. This was an invasion of the province of the Bishop of London and had no counterpart in any of the other colonies.

Id. at 62.

366. *Id*. at 62–63.

367. *Id*. at 63.

368. *Id*. at 63–64. Davidson outlines the provisions of the 1706 statute as follows:

[The act's] provisions were similar to the act of 1704. The same requirements regarding the use of the service of the Church of England were made, and the same provisions for dividing the colony into parishes. The new law included as well the provision for appropriating two thousand pounds of the skin and fur tax for buying glebes, where they could not be secured by grant, and for building churches. The public support and popular election of ministers were again provided, and the clergymen were made the only legal officers for performing marriages. A commission of twenty-four men was appointed, to be a self-perpetuating body, with powers of supervision over secular and financial affairs. A vestry of seven members of the Church of England besides the rector was to be elected annually in each parish. The wardens also were to be chosen annually and were required to take the Oaths of Allegiance and Supremacy. This act was ratified July 30, 1707. It did not contain the feature most objectionable to the English in the former act; that is, the establishment of judicial control of the commission over the clergy. Neither was the provision requiring conformity on the part of the members of the Assembly re-enacted.

Id. (footnote omitted).

369. MCCONNELL, *supra* note 301, at 124–26. McConnell records:

In South Carolina at the opening of the eighteenth century, there was one strong parish at Charleston,—the only one in the province. Between that time and the Revolution it had gained another parish in the same city, had spread to Beaufort, and from there as a second centre, to Goosecreek, Prince George, Santee, through and among the new plantations, and in the new settlements, as they one by one sprang up. As early as 1707 the S.P.G maintained six clergy in the province and had sent over two thousand volumes of books for gratuitous distribution. Two-thirds of the population at the beginning of the century were Dissenters. This proportion was

As a newly independent state in 1776, South Carolina preserved the establishment.[370] In 1778, Article XXXVIII of a new constitution created a general Protestant establishment to replace the exclusive Anglican establishment.[371] This multiple establishment allowed the

> increased by a stream of immigration from Massachusetts and the Northern colonies. The Church of England, on the other hand, was swelled by a considerable number of French Huguenots . . . . [T]he Church continued to more than hold her own until the [War of Independence]. A larger proportion of native-born clergy were probably produced in this than any other colony save Connecticut. This fact kept the priesthood and people more in touch with each other, and saved the Church there from much of the evil which befell her in Maryland and Virginia.

Id. (footnotes omitted).

370. NEVINS, *supra* note 360, at 439. In 1776, the Second Provincial Congress drafted a new constitution for the colony to maintain public order in the absence of Governor Campbell, who had fled Charles Town. This new constitution established a "President" of the legislature who would act as governor without assuming the title, a gesture calculated to make reconciliation with England much easier. ROBERT M. WEIR, COLONIAL SOUTH CAROLINA: A HISTORY 325–27 (Milton M. Klein & Jacob E. Cooke eds., 1983). It also listed the territorial expansion, legal compromise, and Catholic establishment of the Quebec Act as specific grievances provoking the colony to such drastic action. S.C. CONST. of 1776, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3241, 3241–42 ("The English laws and a free government, to which the inhabitants of Quebec were entitled by the King's royal proclamation, are abolished and French laws are restored; the Roman Catholic religion (although before tolerated and freely exercised there) and an absolute government are established in that province, and its limits extended through a vast tract of country so as to border on the free Protestant English settlements, with design of using a whole people differing in religious principles from the neighboring colonies, and subject to arbitrary power, as fit instruments to overawe and subdue the colonies.").

371. S.C. CONST. of 1778, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3248, 3255–57. Article XXXVIII reads as follows:

> That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshiped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges. . . . But that previous to the establishment and incorporation of the respective societies of every denomination as aforesaid, and in order to entitle them thereto, each society so petitioning shall have agreed to and subscribed in a book the following five articles, without which no agreement or union of men upon pretence of religion shall entitle them to be incorporated and esteemed as a church of the established religion of this State:
>
> 1st. That there is one eternal God, and a future state of rewards and punishments.
>
> 2d. That God is publicly to be worshiped.
>
> 3d. That the Christian religion is the true religion.
>
> 4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.

government to incorporate any Protestant congregation but did not provide for tax support.[372]

In 1790, a new constitution was ratified which eliminated the general Protestant establishment and provided for free exercise of religion.[373] Additionally, the new constitution enfranchised non-Protestant citizens, most notably Catholics.[374] Evidencing strong sentiment in favor of the separation of church and state, but without intending any hostility to religion, the constitution also disabled clergy from holding public office.[375]

> 5th. That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.
>
> . . . No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support. But the churches, chapels, parsonages, glebes, and all other property now belonging to any societies of the Church of England, or any other religious societies, shall remain and be secured to them forever.

Id. at 3248, 3255–57.

372. COBB, *supra* note 245, at 507. Cobb comments concerning religious taxes:

> Beyond exclusion from office, non-Christians were not subjected to imposition; no penalties were carried by the terms of the constitution, while that instrument expressly ordained that: "No person shall by law be obliged to pay towards maintenance and support of a religious worship, that he does not freely join in, or has not voluntarily engaged to support."

Id.

373. S.C. CONST. of 1790, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3258, 3264. Article VIII provides:

> SECTION 1. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: *Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.
>
> SECTION 2. The rights, privileges, immunities, and estates of both civil and religious societies, and of corporate bodies, shall remain as if the constitution of this State had not been altered or amended.

Id.

374. COBB, *supra* note 245, at 517. Cobb states, "The *South Carolina* constitution of 1790 put aside its elaborate provisions as to Churches, ministers, and a *Protestant* establishment. By this action it enfranchised Roman Catholics, and in set terms provided for religious freedom, 'without distinction or preference.'" *Id*.

375. S.C. CONST. of 1790, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3258, 3261. Article I, Section 23 provides:

> And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or public preacher of any religious persuasion, whilst he continues in the exercise of his pastoral functions, shall be eligible to the office of governor, lieutenant-governor, or to a seat in the senate or house of representatives.

7. Georgia

The southernmost colony, named for George II, was both the largest in square miles and the least populated. The Spanish had stopped their northward progress when no gold was found and, in the face of repeated attacks by Native Americans, left Georgia as a buffer zone between British possessions to the north and the French and Spanish colonial efforts along the Gulf of Mexico. An English attempt at colonization, by Sir Robert Montgomery in 1717, was intended as a feudal utopia. It never managed to get further than the draft of a plan. The first successful venture resulted from a cooperative effort between South Carolina merchants, Parliament, and a handful of philanthropists. Headed by James Edward Oglethorpe, the officers of a trust created by the English crown in 1732 administered a colony populated by Englishmen released from debtors' prison. Their duty, in return, was to serve as citizen-soldiers to protect the colonies further north from attack, principally by Native American tribes.[376]

The idea of a fresh start for the poor and news that dissenters were welcome drew a wide variety of applicants for immigration.[377] To encourage religion, the trustees personally paid the salaries of the Anglican clergy between 1738 and 1741, and they set aside glebe lands in an effort to spur church growth.[378] No religious taxes were levied under the trustees, but then no taxes were assessed for any purpose.[379] Governance of this southern colony reverted to the crown in 1752, making it the newest royal colony.[380]

Id.

376. 3 ESMOND WRIGHT, THE SEARCH FOR LIBERTY: FROM ORIGINS TO INDEPENDENCE 76–77 (1995).

377. REBA CAROLYN STRICKLAND, RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY 36–43 (Faculty of Political Sci. of Columbia Univ. ed., 1939). On represented religious groups, Strickland writes:

> Anglicans, Scotch Presbyterians, French Huguenots, Swiss Calvinists, Lutherans, Moravians and Jews: What a heterogeneous group to find in a new and small community! But one element appears to have been lacking and that was "papists", as Catholics were called in the eighteenth century. The efforts taken to keep them out of the colony must have been quite successful for the largest number reported to be in Georgia during the proprietary period was four in 1747.

Id. at 43 (footnote omitted).

378. *Id.* at 44–45. The trustees also granted glebe lands to dissenters. *Id.* at 70.

379. *Id.* at 44–45. Strickland discusses the establishment of the Church of England under the trustees as follows:

The new government in Georgia attempted to establish the Church of England in 1755 and again in 1757, but dissenters managed to defeat both measures.[381] In 1758, the Anglicans successfully pushed through an act establishing the Church of England.[382] The poverty of most settlers made religious assessments impractical.[383] However, the colonial government did take financing the established church seriously and taxed liquor consumption and real estate in order to maintain both ministers and church property.[384] The established clergy also apparently benefited handsomely from the glebe lands and their lucrative products.[385]

> If one defines an established church as one supported by the government, perhaps the Church of England was established in Georgia during the period of about four years (1738–1741) when the Trustees paid the ministers' salaries. On the other hand, if one defines an established church as one which the people are taxed to support, no church was established during this period. But, of course, no taxes were levied for any purpose. On the whole, the position of the Church of England in Georgia was that of a missionary enterprise with missionaries chosen by the Trustees and encouraged financially by the government of the colony.

Id.

380. *Id.* at 98. The reorganization of Georgia into a royal province did not take place until 1754. *Id.* at 101 (footnote omitted).

381. *Id.* at 102–04. Concerning the 1757 bill, Strickland reports, "There were two groups of dissenters opposing the bill, the Salzburgers and the Puritans of Midway. The beloved minister of the Salzburgers, John Martin Bolzius, directed a long protest to the Commons against it." *Id.* at 103.

382. *Id.* at 109. The effect of this legislation was more than exclusive support for the Church of England. It divided the colony into parishes to be utilized as both religious and administrative units. As Strickland observes, "After the passage of the religious establishment act of 1758 the vestry of each parish became the chief organ of local government." *Id.* (footnote omitted).

383. *Id.* at 111. According to Strickland, "The people of Georgia were too poor before 1763 to pay even moderate taxes and, like many other colonies, Georgia was forced to resort to paper money to carry on the government." *Id.* The vestry of Christ Church in Savannah is evidently the only body to levy such taxes starting in 1763. *Id.* at 110 (footnotes omitted).

384. *Id.* at 113. Concerning this early version of a "sin tax," Strickland quips, "Perhaps the legislators thought there was a sort of poetic justice in tying the support of religion to the prosperity of the liquor business! At any rate, it was quite profitable for the church." *Id.*

385. *Id.* at 112. Strickland states:

> Cultivation of the glebe and the sale of lumber from it should have furnished a good income to the ministers who would take the time to manage it. Lumber and rice were bringing prosperity to Georgia and probably to the ministers as well. Charles Woodmason of South Carolina, visited Georgia in 1766 and found that good land had been granted for glebes. Glebes had been granted for the Church of England in Savannah (Christ Church) and in Augusta (St. Paul's) during the proprietorship, and grants were made for all the parishes except St. James before the Revolution.

As Georgia transformed from colony to state, the religious diversity of the population shaped the constitution. The constitution of 1777 guaranteed the free exercise of religion to all[386] but limited seats in the legislature to nonclerical[387] Protestants.[388] The constitution of 1789 removed the Protestant requirement for holding public office but maintained the clergy prohibition[389] and limited the power to levy religious assessments.[390] Removing the disqualification of clergy and eliminating the authorization for the collection of religious assessments was left to the constitution of 1798.[391]

Therefore, disestablishment in the Middle and Southern Colonies define the first of the two stages of the American church-state settlement. Although their paths varied, each of the Middle and Southern fledgling states came to the same conclusion: a jurisdictional separation of the two authorities of church and state best facilitates healthy churches and a republic free of civil strife over religious doctrine.

Id. at 112. Strickland also records that the Society for the Propagation of the Gospel was involved in supporting Georgian ministers. After the coming of independence, the comfortable living of the clergy became more evident. *See id.* at 111.

386. GA. CONST. of 1777, *reprinted in* 2 CONSTITUTIONS, *supra* note 230, at 777, 784. Article LVI provided, "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession." *Id.* at 777, 784.

387. *Id.* at 777, 785. Article LXII stated, "No clergyman of any denomination shall be allowed a seat in the legislature." *Id.* at 777, 785.

388. *Id.* at 777, 779. Article VI required all representatives to "be of the Protestant religion." *Id.*

389. GA. CONST. of 1789, *reprinted in* 2 CONSTITUTIONS, *supra* note 230, at 785, 787. Article I, section 18 prohibited clergymen from being members of the general assembly. *Id.*

390. *Id.* at 785, 789. Article IV, section 5 forbade obligatory contributions to a religion to which the individual does not profess to belong. *Id.*

391. GA. CONST. of 1798, *reprinted in* 2 CONSTITUTIONS, *supra* note 230, at 791, 800–01. Article IV, section 10, disestablished the church in Georgia by stating:

> No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tiths, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do. No one religious society shall ever be established in this State, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.

Id.

C. John Leland: Evangelist of Dissent

The life of John Leland (1754–1841) exemplifies the American church-state proposition in more respects than any other figure during the fifty-nine-year period of disestablishment. As a Baptist minister, Leland advanced an agenda driven by his faith and concern for individual believers and the autonomy of the church. As a citizen active in politics he evolved from a Jeffersonian Republican into a Jacksonian Democrat. Leland received his practical training during the struggle to disestablish Virginia's Anglican church. He then put this experience to work in the second stage of the American settlement: the disestablishment of New England's Standing Order. His efforts in Virginia, Connecticut, and Massachusetts for the cause of disestablishment and religious liberty were instrumental in finally securing the uniquely American settlement of church-state relations.

1. Virginia: Leland's crucible

Leland was born in Grafton, Massachusetts, and received his call to the ministry at the age of eighteen. After marrying in September of 1776, Leland and his bride journeyed to Virginia where he ministered initially at Mount Poney, and then for fourteen years at Orange near the home of James Madison. His aptitude, although never refined by a collegiate education, would serve him well as he began a campaign for freeing the church from state regulation—an effort that would consume much of his life's work.[392]

The Virginia years would prove to be Leland's crucible, purifying and molding his political views until they were consistent and resilient. Virginia Baptists joined forces with powerful figures like Madison and George Mason, who lent their encouragement, votes, and other support. However, it was not until Madison's famous "legislative duel with Patrick Henry"[393] over religious assessments had reached its conclusion in early 1786 that Leland's name appeared in the official state record as a legislative agent (lobbyist).[394] He was again sent to the state capital in 1788 to lobby the state to

392. L.H. BUTTERFIELD, ELDER JOHN LELAND, JEFFERSONIAN ITINERANT, *reprinted in* COLONIAL BAPTISTS AND SOUTHERN REVIVALS 160–68 (Edwin S. Gaustad ed., 1980) (1952).

393. *Id.* at 176.

394. *Id.* at 177.

reclaim glebe lands still held by Episcopal clergy, but this mission was unsuccessful.[395]

Although Leland remained a cautious opponent of slavery, he became deeply involved in the other point of controversy that divided Baptists as well as most Virginians: ratification of the United States Constitution.[396] The Virginia Baptist General Committee met in March of 1788 and concluded that the proposed Constitution did not sufficiently protect religious freedom.[397] At the request of Thomas Barbour, a candidate for delegate from Orange County to the ratifying convention, Leland drafted ten objections to the Constitution.[398] In a letter to Madison urging him to return to Virginia, Joseph Spencer candidly pointed out that while the Baptists "pretend to other objections," the tenth was their real concern; should it "be remov'd by sum one caperble of the Task, I think thay would become friends to it, that body of people has become very formible in point of Elections."[399] Leland's tenth objection reads:

> What is clearest of all—Religious Liberty, is not sufficiently secured, No Religious test is Required as a qualification to fill any office under the United States, but if a Majority of Congress with the President favour one System more then another, they may oblige all others to pay to the support of their System as much as they please, and if Oppression does not ensue, it will be oweing to the Mildness of Administration and not to any Constitutional defense, and if the Manners of People are so far Corrupted, that they cannot live by Republican principles, it is Very Dangerous leaving Religious Liberty at their Mercy.[400]

In response to the plea from Spencer, as well as letters from James Madison, Sr. and James Gordon, the younger Madison decided to return to Virginia in order to promote, in his own state,

395. *Id.* at 178. It was not until 1799 that Virginia repossessed and sold the lands granted to the formerly established church. By this time, Leland had returned to New England and was fully engaged in the battle for disestablishment there. *Id.*

396. *Id.* at 181–96. Butterfield surveys Leland's antislavery attitude, and then devotes an entire section of the article to his involvement in Virginia's ratification of the U.S. Constitution.

397. *Id.* at 183–84.

398. *Id.* at 186.

399. *Id.* at 185–86. Butterfield reproduces the letter in its entirety.

400. *Id.* at 188.

the Constitution that he had been so instrumental in creating.[401] The events that took place between March 20 and 24, 1788, are shrouded in folklore and local myth.[402] But, as with most legends, the story is undergirded with a few documentable facts. Francis Taylor, a neighbor to the Madisonian Montpelier plantation, recorded in his diary a March 22 dinner at the home of Major Moore, and at which the assembled guests expected "Col Madison" to join them. While Madison failed to appear for dinner, Taylor records on the twenty-third that Madison did arrive at Moore's house late that night and continued on to Montpelier the next morning.[403] While it is uncertain that Madison's tardiness was caused by a stop over to visit with Leland, the election results of the twenty-fourth are proof that something had happened to sway the Baptists to Madison's side. After a campaign that totaled less than a week, Madison won the delegate seat by a margin of fifteen votes over the next contender.[404]

Still more significant is Madison's newfound commitment to a national bill of rights after having long contended that the Constitution was adequate as written. Whether or not Leland's desire for a bill of rights was the cause of Madison's reversal cannot be known with certainty. What is certain is Madison's sentiment expressed in a letter to George Eve on January 2, 1789. Madison writes that although he had not previously apprehended any danger to civil or religious liberty in the Constitution, "[c]ircumstances are now changed," and therefore:

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress . . . ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants[, etc].[405]

401. For excerpts from the letters from James Madison, Sr. and James Gordon, see *id.* at 184–85. The younger Madison had been in New York City penning installments of what are now known as The Federalist Papers. *Id.* at 184.

402. *Id.* at 188–90.

403. *Id.* at 191–92.

404. *Id.*

405. *Id.* at 192–93. While the support of the Virginia Baptists for or against ratification of the Constitution turned on the matter of religious freedom, that was not a factor elsewhere

It requires little imagination to view such a dramatic reversal by Madison as being in response to his obligation to Leland and the Baptists in return for their election support.

2. Connecticut: Leland as pamphleteer

In March of 1791 Leland left Virginia and moved to New England,[406] booking passage for his wife and eight children on a vessel that would carry them to New London, Connecticut. While the Lelands lived in Connecticut only until July of the same year, Leland would remain engaged in the battle for disestablishment there by way of pamphlet writing until 1806.[407] This Connecticut campaign would reveal the writer in Leland and complete his preparation for the siege against the Standing Order in Massachusetts.

The Rights of Conscience Inalienable, published originally in 1791, was Leland's first assault on the Connecticut establishment.[408] He opens by stating that the several world governments are premised upon one of four foundations: birth, property, grace, or compact.[409]

in America. JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788, at 159 (2d ed. 2004).

406. Leland is silent as to the motive behind the move or its timing. Butterfield opines:

> He may also have felt that there was now more work to do in the north than in the south. The victory for religious freedom had been won in Virginia. The Baptist faith was strong there, stronger than any other in the state, and it far outnumbered the Baptist population of any other state. . . . It was success rather than the want of it that probably impelled Leland to seek other pastures.

BUTTERFIELD, *supra* note 392, at 196.

407. *Id*. at 196–201.

408. *Id*. at 197–98. The full title of the original is: *The Rights of Conscience Inalienable, and Therefore, Religious Opinions Not Cognizable by Law: or, The High-Flying Churchman, Stript of His Legal Robe, Appears a Yaho*. Butterfield comments, "Its substance is as forceful as its title." *Id*. at 198.

409. JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE, *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 179 (L.F. Greene ed., 1845) (1791) Leland writes:

> There are four principles contended for, as the foundation of civil government, viz., birth, property, grace, and compact. The first of these is practised upon in all hereditary monarchies . . . . The second principle is built upon in all aristocratical governments, . . . The third principle is adopted by those kingdoms and states that require a religious test to qualify an officer of state, proscribing all non-conformists from civil and religious liberty.
>
> . . . .
>
> The fourth principle, (compact,) is adopted in the American states, as the basis of civil government. This foundation appears to be a just one. . . .

After pointing out the strength of compact and the weaknesses of the others,[410] Leland tells a parable of nine men marooned on an island and draws eight principles of government from this imagined experience.[411] Leland finally addresses the main question by giving four reasons why religiously informed conscience is inalienable.[412]

Id.

410. *Id*. Leland describes monarchies and aristocracies in such a way that assumes their evil nature, an assumption that was safe to make in 1791. Concerning grace as a foundation for government, however, Leland says:

> This was the error of Constantine's government, who first established the Christian religion by law, and then proscribed the Pagans, and banished the Arian heretics. This error also filled the heads of the Anabaptists, in Germany, who were re-sprinklers. They supposed that none had a right to rule but gracious men. The same error prevails in the See of Rome, where his holiness exalts himself above all who are called gods, (i.e., kings and rulers,) and where no Protestant heretic is allowed the liberty of a citizen. This principle is also pleaded for in the Ottoman empire, where it is death to call in question the divinity of Mahomet, or the authenticity of the Alcoran.
>
> This same evil has entwined itself into the British form of government, where, in the state establishment of the church of England, no man is eligible to any office, civil or military, without he subscribes to the thirty-nine articles and book of common prayer; and even then, upon receiving a commission for the army, the law obliges him to receive the sacrament of the Lord's supper, and no non-conformist is allowed the liberty of his conscience without he subscribes to all the thirty-nine articles but about four. And when that is done, his purse-strings are drawn by others to pay preachers in whom he puts no confidence, and whom he never hears.
>
> This was the case in several of the southern states, until the revolution in which the church of England was established.

Id.

411. *Id*. at 179–80. The eight principles are as follows:

> First, that the law was not made for a righteous man, but for the disobedient. Second, that righteous men have to part with a little of their liberty and property to preserve the rest. Third, that all power is vested in, and consequently derived from the people. Fourth, that the law should rule over rulers, and not rulers over the law. Fifth, that government is founded on compact. Sixth, that every law made by legislators, inconsistent with the compact, modernly called a constitution, is usurping in the legislators, and not binding on the people. Seventh, that whenever government is found inadequate to preserve the liberty and property of the people, they have an indubitable right to alter it so as to answer those purposes. Eighth, that legislators, in their legislative capacity, cannot alter the constitution, for they are hired servants of the people to act within the limits of the constitution.

Id. at 180.

412. *Id*. at 180–81. These reasons, in summary fashion, are: (1) since government may not stand as proxy for the individual, it may not interfere with matters of conscience; (2) to force the individual to surrender to the state what is to be reserved for God would be to force the individual to sin; (3) while an individual may voluntarily submit to a rule in good conscience, the same individual may not bind the consciences of his/her children in their

Echoes of Elisha Williams and Isaac Backus can be heard in these reasons, as well in most of Leland's writings. He anticipates the argument that a church establishment is necessary for the continuing survival of both church and state by demonstrating the durability of each in the absence of, or in spite of, the other.[413] Leland proposes five evils of establishment,[414] five reasons why churches have been established in the past,[415] and three reasons why the clergy support

minority; and (4) since religion is a matter between the individual and God, religious opinions are in no way to be controlled by civil government.

413. *Id.* at 181–83. Leland points out that Rhode Island, New York, New Jersey, and Pennsylvania had all been healthy colonies with vibrant religious lives without ever establishing a particular religious tradition by law. The southern states, which had previously established the Anglican Church by law, were prospering under their new regime of disestablishment. As for the church's ability to survive without support, Leland candidly reminds the reader that Christianity flourished for three centuries before Constantine's conversion.

414. *Id.* at 182–83. Leland opines:

> *First.* Uninspired, fallible men make their own opinions tests of orthodoxy. . . .
>
> *Second.* Such establishments . . . are also very impolitic, especially in new countries; for what encouragement can strangers have to migrate with their arts and wealth into a state, where they cannot enjoy their religious sentiments without exposing themselves to the law? . . .
>
> *Third.* These establishments metamorphose the church into a creature, and religion into a principle of state, which has a natural tendency to make men conclude that *Bible religion* is nothing but a *trick of state*; hence it is that the greatest part of the well-informed in literature are overrun with deism and infidelity . . . .
>
> *Fourth.* There are no two kingdoms and states that establish the same creed and formalities of faith, which alone proves their debility. In one kingdom a man is condemned for not believing a doctrine that he would be condemned for believing in another kingdom. . . .
>
> [Fifth.] The nature of such establishments, further, is to keep from civil office the best of men. Good men cannot believe what they cannot believe, and they will not subscribe to what they disbelieve, and take an oath to maintain what they conclude is error . . . whereas villains make no scruple to take any oath.

Id.

415. *Id.* at 183–86. Leland's reasons are:

> *First.* The love of importance is a general evil. . . .
>
> *Second.* An over-fondness for a particular system or sect. . . .
>
> *Third.* To produce uniformity of religion. . . . Millions of men, women and children, have been tortured to death, to produce uniformity, and yet the world has not advanced one inch towards it. . . .
>
> . . . Let every man speak freely without fear, maintain the principles that he believes, worship according to his own faith, either one God, three Gods, no God, or twenty Gods; and let government protect him in so doing, i.e., see that he meets with no personal abuse, or loss of property, for his religious opinions. . . .
>
> . . . .
>
> . . . So when one creed or church prevails over another, being armed with a coat of mail, law and sword, truth gets no honor by the victory. Whereas if all stand upon one footing, being equally protected by law, as citizens, (not as saints,) and

such legal establishments.[416] He moves on to point out the harmful impact of these laws on non-Protestants,[417] broadens the point by

one prevails over another by cool investigation and fair argument, then truth gains honor; and men more firmly believe it, than if it was made an essential article of salvation by law. . . .

. . . It is error, and error alone, that needs human support; and whenever men fly to the law or sword to protect their system of religion, and force it upon others, it is evident that they have something in their system that will not bear the light and stand upon the basis of truth.

Fourth. . . .

. . . Is the Bible written (like Caligula's laws) so intricate and high, that none but the letter learned (according to common phrase) can read it? . . . Do not those who understand the original languages, that the Bible was written in, differ as much in judgment as others? . . . If not, have not the learned to trust to a human transcription, as much as the unlearned have to a translation? If these questions, and others of the like nature, can be confuted; then I will confess that it is wisdom for a conclave of bishops, or a convocation of clergy to frame a system out of the Bible, and persuade the legislature to legalize it. No; it would be attended with so much expense, pride, domination, cruelty and bloodshed, that let me rather fall into infidelity; for no religion at all, is better than that which is worse than none.

Fifth. The groundwork of these establishments of religion is, *clerical influence*.

Id. at 183–85.

416. *Id*. at 186. In Leland's words:

What stimulates the clergy to recommend this mode of reasoning is:

First. Ignorance, not being able to confute error by fair argument.

Second. Indolence, not being willing to spend any time to confute the heretical.

Third. But chiefly covetousness, to get money, for it may be observed that in all these establishments, settled salaries for the clergy, recoverable by law, are sure to be interwoven; and was not this the case, I am well convinced that there would not be many, if any religious establishments in the Christian world.

Id.

417. *Id*. at 186–90. Leland's argument includes:

Let it suffice on this head, to say, that it is not possible, in the nature of things, to establish religion by human laws, without perverting the design of civil law and oppressing the people. . . .

. . . .

This certificate law is founded on this principle, "that it is the duty of all persons to support the gospel and the worship of God." Is this principle founded in justice? Is it the duty of a deist to support that which he believes to be a cheat and imposition? Is it the duty of a Jew to support the religion of Jesus Christ, when he really believes that he was an imposter? Must the Papists be forced to pay men for preaching down the supremacy of the pope, who they are sure is the head of the church? Must a Turk maintain a religion, opposed to the Alkoran, which he holds as the sacred oracle of heaven? These things want better confirmation. If we suppose that it is the duty of all these to support the Protestant Christian religion, as being the best religion in the world; yet how comes it to pass, that human legislatures have a right to force them so to do? I now call for an instance, where Jesus Christ, the author of his religion, or the apostles, who were divinely inspired, ever gave orders

showing the negative implication for Protestants of the state's jurisdiction over religion,[418] and then closes with final comments.[419] Much of this prolific commentary discusses either how establishment unduly empowers the state over the church and corrupts religion, or how it violates the conscience of religious dissenters.

Leland's next jeremiad directed at Connecticut was in a collection of materials meant to arm the Connecticut Baptists for

to, or intimated, that the civil powers on earth, ought to force people to observe the rules and doctrine of the gospel.

Mahomet called in the use of the law and sword, to convert people to his religion; but Jesus did not—does not.

It is the duty of men to love God with all their hearts, and their neighbors as themselves; but have legislatures authority to punish men if they do not; so there are many things that Jesus and the apostles taught, that men ought to obey, which yet the civil law has no concern in.

Id. at 187.

418. *Id*. at 188–89. Leland writes:

[I]f the legislature of Connecticut, have a right to establish the religion which they prefer to all religions, and force men to support it, then every legislature or legislator has the same authority; and if this be true, the separation of the Christians from the Pagans, the departure of the Protestants from the Papists, and the dissent of the Presbyterians from the church of England, were all schisms of a criminal nature; and all the persecution that they have met with, is just the effect of their stubbornness. . . .

. . . .

. . . Ministers should share the same protection of the law that other men do, and no more. To proscribe them from seats of legislation, etc., is cruel. To indulge them with an exemption from taxes and bearing arms is a tempting emolument. The law should be silent about them; protect them as citizens, not as sacred officers, for the civil law knows no sacred religious officers. . . .

. . . .

The principle of the law, is, that the gospel is not to be supported by law; that civil rulers have nothing to do with religion, in their civil capacities; what business had they then to make that law? The evil seemed to arise from blending religious *right* and religious *opinions* together. Religious *right* should be protected to *all* men, religious *opinion* to none; . . . each individual having a *right* to differ from all others in *opinion* if he is so persuaded.

Id.

419. *Id*. at 190–92. In the fourth point of his conclusion, Leland ponders the lunacy of imposing Connecticut's certification laws on as esteemed an immigrant as George Washington:

Suppose that man, whose name need not be mentioned, but which fills every American heart with pleasure and awe, should remove to Connecticut for his health, or any other cause, what a scandal would it be to the state, to tax him to support a Presbyterian minister, unless he produced a certificate, informing them that he was an Episcopalian.

Id. at 191.

battle.[420] Included in *The Connecticut Dissenters' Strong Box: No. 1* was a reprint of his 1791 tract along with a draft petition for the General Assembly, a sampling of Connecticut's ecclesiastical laws, excerpts from the national and various state constitutions,[421] and additional commentary.[422] The petition reiterates the claim that religious establishments pervert rather than advance true religion.[423] It enumerates various Connecticut laws with which the Baptists took issue.[424] The prayer for relief asks "that the pure religion of Christ may be left alone in his hands, to be governed entirely by his laws and influence."[425] In the *Strong Box*'s remarks, the compiler highlights the biblical nature of the church, the church's voluntary character, and the perverting effect of legal establishments on religion.[426] The *Strong Box* closes with a promised second volume

420. BUTTERFIELD, *supra* note 392, at 200. Butterfield writes, "In conjunction with the earliest petitions a periodical was launched by Leland's brethren at New London, which, contained a store of ammunition sufficient for a long campaign." *Id.*

421. *Id.* at 200–01. The states from which constitutional extracts were drawn include Vermont, Rhode Island, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Tennessee.

422. *Id.* at 200. Butterfield's inventory reads as follows:

> Entitled *The Connecticut Dissenters' Strong Box*, it contained a reprint of Leland's *Rights of Conscience Inalienable*, the form of a petition protesting the disabilities of dissenters, "Extracts from Connecticut Ecclesiastical Laws," extracts from the United States Constitution and sixteen state and territorial constitutions in which freedom of conscience was guaranteed, and, finally, summaries of the church-state relationship in Connecticut, Massachusetts, and New Hampshire.

Id. (footnote omitted).

423. THE CONNECTICUT DISSENTERS' STRONG BOX: NO. I, at 23–25 (New London, Charles Holt 1802). The petition reads in pertinent part:

> [Believing] that all laws which oblige a man to worship in any particular mode, or which compel him to pay taxes, or in any way assist in the support of those who teach a religious doctrine contrary to his own are tyrannical and unjust;—believing that all subordination of one religious sect to another has a tendency to suppress the investigation of religious opinions and promote contentions among the different denominations of christians . . . believing also that all religious establishments are opposed to the pure spirit of christianity, and tend to introduce oppression, hypocrisy and inquietude.
>
> . . . .
>
> [We ask this Assembly] to repeal, alter or amend the above mentioned laws and regulations as not to interfere with the natural rights of freemen nor the sacred rights of conscience in any case whatsoever.

Id.

424. *Id.*

425. *Id.* at 25.

426. *Id.* at 38–40. The compiler is identified only as "a dissenter." We do not know if the dissenter is Leland. The compiler opines:

and a sampling of its proposed contents. This sequel, however, apparently never surfaced.[427]

Leland's last effort on behalf of the Connecticut Baptists was a pamphlet entitled *Van Tromp Lowering His Peak with a Broadside*, published in 1806.[428] After introductory remarks, he accuses Connecticut's ecclesiastical laws of being unscriptural,[429]

> A church is a voluntary association for *religious purposes*, not for *political* purposes; to feed his shepherds with the bread *of life*, not to feed Christ's sheep with the bread of *idleness*; to prepare men to be *saints* in heaven, not to prepare them to be *subjects* on earth. On the contrary, the state is an association merely for political purposes; to protect our bodies, not our souls; our properties, not our principles. The object of ecclesiastical union is to gain treasures in heaven, by prayers, by preaching, and by the still small voice of a peace-whispering gospel. The object of political union is to defend our treasures on earth, by force, by violence, and the loud harsh voice of the thunder-speaking cannon. The church allures men to virtue by hopes of celestial joys; the state deters them from vice with fears of terrestrial pains. The church with a fond parent's smile presents the *book of life* perfumed with promises; the state with a step-mother's *grin* holds out the statute law, stinking with penalties.
>
> The union of church and state is like the union of the doe and the dog, the lamb and the hedgehog, the dove and the sparrow-hawk. Let us endeavor to divorce them, to dissolve their unnatural connexion, a connexion productive only of hypocrites, destitute of every good work. Let us no longer debase and scandalize religion by making it consist merely in a blind and stupid belief of the absurd dogmas of *school* divinity. . . . Let religion be no longer considered as a trick of state, but as a work of *grace*. Let it not be cast by as a polished link in the tyrant's chain, but be cherished as the fairest garland on freedom's brow. . . . Let *all mankind* be left at perfect liberty to form voluntary associations for religious worship—THEN FREE AS AIR'S EXPANDED SPACE, TO EV'RY SOUL AND SECT WILL BE THAT SACRED PRIV'LEGE OF OUR RACE, THE WORSHIP OF THE DEITY.

Id.

427. BUTTERFIELD, *supra* note 392, at 200. Butterfield says simply, "No copy of the *Strong Box*, No. II, has been found." *Id.*

428. *Id.* at 201. Leland explains his title as follows:

> At a certain period, the English allowed the Dutch to ride the high seas, provided the Dutch would lower their peaks to English ships; which haughty demand so insensed the intrepid Van Tromp; that whenever the English gave him a signal to drop his peak, he would answer them with a Broad-side.

JOHN LELAND, VAN TROMP LOWERING HIS PEAK WITH A BROADSIDE 2 (Danbury, Stiles Nicholas 1806).

429. LELAND, *supra* note 428, at 6–7. Leland writes:

> The blessed Jesus was extremely cautious not to intrude into the *civil* department: he would not, as a judge, divide the interests of two brothers—He did not condemn the adulterous woman to be stoned according to Moses' law—He promised no deliverance to his followers from punishment (if they had broken the laws of State) until they paid the last mite. He did not deliver the penitent thief from the penalty of the law; altho' as a Saviour, he promised him admission into paradise.

illegitimate,[430] underinclusive,[431] and oppressive.[432] In answer to the objection that the certificate system is a mere trifle, Leland points out that the Tea Act of 1773 was considered a trifling tax by Great Britain, but not by the American patriots.[433] He pleads guilty to

> Were civil rulers as cautious not to intrude into the empire of Christ, it would be much better for the world.

Id. at 7.

430. *Id.* at 7–9. Leland argues that citizens can alienate only those rights that they possess in the first place over to the government, then continues:

> But is there a man in Connecticut, who believes himself in possession of such power and right over his neighbour; or that his neighbor has that preeminence over himself? If such an individual cannot be found in the State; then the Legislature must be void of that rightful power; as the contrary conclusion would be, that the creature is greater than the Creator.
>
> These laws are also *illegitimate*, because they meddle with that *sacred depository of rights* which are of themselves *inalienable* and never were surrendered to society.

Id. at 8.

431. *Id.* at 9. Leland reasons:

> If christianity calls for the aid of *law* to protect and support it; why not equally protect and support *all* the professors and preachers of it? why not be at as much expence to erect and endow a College for the Glassites, Methodists, Episcopalians or Baptists, as for the Presbyterians and Congregationalists? why not call each of those societies "The established order?" why not oblige all the Presbyterians to give certificates to the clerks of those societies, to get exempted from legal taxation to them? And why not consider all those who join no society, as belonging to the Glassites, Methodists, Episcopalians or Baptists? If the mischief of *partiality* is not here framed by a law; it is difficult to tell what partiality is.

Id.

432. *Id.* at 9–10. In Leland's words:

> That these laws are *oppressive*, needs no proof, but only to cast our tho'ts on the many *distraints, fines* and *imprisonments*, which they have occasioned; not for overt acts, but simply because the sufferers did not believe in a state established religion; could not see the justice in being obliged to pay a man for preaching who they did not hear and were bound in conscience to testify that religion was distinct from state policy; and of course, submit to suffering rather than to yield voluntarily to a usurped power, which the Almighty never ordained either in Church or State.

Id.

433. *Id.* at 11. Leland's account follows:

> The certificate act is called a *Trifle*; so was the *three penny act* on Tea, but, as well as Americans love tea, they would not drink it, in that indignant manner. It was looked upon as a nest-egg. It required an acknowledgment from the Americans, that the British parliament had a right to tax these Colonies at pleasure. How profuse was the Oratory, and how cogent the arguments of Henry, Jefferson, Hancock, Adams, Warren, Dickinson, &c. against the usurpation of Britain at that day. And shall any of the free-born sons of Connecticut, for ever tamely submit to that which *they* consider more arrogant and more pernicious, and never have their grievances redressed, nor even be allowed a dispassionate hearing?

Id.

charges that Baptists refute "the right of the legislature to make religious laws."[434] Leland draws out the contradiction of using law to maintain Christian piety by pitting the theology of the established clergy (i.e., man should be moral out of willing obedience to God) against the rationale of the government (i.e., man should be moral out of obedience to law).[435] Leland also rejects the argument that religious assessments permit ministers to be free to pursue their ministerial duties rather than labor for the support of their congregants. Leland's response interjects a humorous illustration involving a motion by a bishop (lord spiritual) sitting in the House of Lords.[436] He then points out that ecclesiastical laws arise not from

434. *Id*. at 14. He gives two reasons for this denial of jurisdiction:

> 1st. It is evident that no article comes within the compass of the legislature but what *natural men*, as such, are competent to legislate about. . . . Whether, therefore, the christian religion be true or false, it is *wrong* to make religious laws. In this particular, Bible-Christians and deists have an equal plea against religious tyranny; and often unite together to repel religious tyrants.
>
> 2d. If it is right, for legislatures to make laws about the concerns of souls, to prepare men for eternity; then of course the Judiciary are to judge and determine such cases.
>
> A few years past, when governor [John] Jay was chief Justice of the United States; a man was tried for his life before him, at Newport. . . .
>
> In this case, the great judge and great lawyer both agreed that *jurors had nothing to do with souls and eternity.*

Id. at 14–15.

435. *Id*. at 16–17. Leland writes:

> Now, who are we to believe? In 200 meeting houses, the people are informed every sunday, by the established divines, that the *freedom of the will* is essential to constitute *moral virtue*; and by as many legislators, they are assured, every session, that men must be *forced by law* to perform *morality*. Is this the logic taught at New Haven!—Is this divinity of Connecticut, called *Calvinism refined*! If we do not believe the divines, we are called infidels: If we do not believe the legislators, we are reputed seditious jacobins. If we believe the divines we cannot believe the legislators. If we believe the legislators, we must renounce the opinion of the divines; and if we believe both we must be fools.

Id.

436. *Id*. at 18–22. Leland relates:

> I once heard of an instance, which took place in the British House of Lords, which was this. A spiritual Lord Bishop, made a motion to *stop itinerate preaching*. A young Lord temporal arose and seconded the motion; offering at the same time a scheme to carry the motion into effect. The scheme was, "that all the itinerant preachers should be made Bishops." From this instance the question arises, whether a legal provision made for preachers, with the pretence of relieving them from worldly embarrassments, does not serve rather to retard than stimulate them in the work of the Lord? If history and experience are consulted, the result will be, that the *pampered* are the most *indolent*.

Id. at 21.

prudence, but from an unsavory pact between the established clergy and the civil rulers.[437]

Leland next criticizes Sabbath laws, a topic he would warm to in later tracts, before moving to the final thrust of the pamphlet. Connecticut did not adopt a new constitution following independence but kept its charter issued by Charles II, except that all references to the crown or parliament were expunged. Leland proposes that the charter is deficient in that it grants autocratic power to the rulers of the state.[438] He argues that religious laws make the church a creature of the state instead of one built by God, and that these laws, not their repeal, are the cause of spiritual infidelity.[439] Leland points out that the corruption of both the church and the

437. *Id.* at 22. Leland writes:

> From this view of the subject a confederacy was formed between *Rulers* and *Priests.* The *Priests* on their part were to preach *obedience to the Magistrates* and the laws; and the *Rulers* on their part, were to oblige the people to pay the *priests* for their work. The idea, therefore, of a *christian-commonwealth*, and a consequent *confederation* between *rulers* and *priests* gave birth to those laws.

Id.

438. *Id.* at 32. In Leland's words:

> The people of Connecticut have never been asked, by those in authority, what form of government they would chuse; nor in fact whether they would have any form at all. For want of a specific constitution, the rulers run without bridle or bit, or any thing to draw them up to the ring-bolt. Should the legislature make a law, to perpetuate themselves in office for life; this law would immediately become part of their constitution; and who could call them to an account therefor?

Id.

439. *Id.* at 27. Leland's proposes:

> If the church is a creature of state, and religion a principle of policy—If the gospel is dependant on the laws of man, and Colleges erected and endowed by legal authority—If the Bible is sufficient to make men wise unto salvation without canonical laws—If none but the literati can be called of God and made able ministers of the New-Testament; and if the ministers of the gospel cannot be as useful to men, without a legal provision, as with it? Then it is confessed, the sentiments of this apology tend to *infidelity.*
>
> But, if the Church is built, *not by force nor might*, but by God's spirit—If religion is distinct from state policy; being, in its nature too spiritual and mysterious to legislate about—If the gospel did stand nearly three centuries, in the purest ages of christianity, without the aid of law or legally endowed Colleges; does yet stand, and prevail most in those states, where it is not supported by law—If the bible is a complete code of itself, without the creeds, catechisms, articles and homelies of men—If God is now able, and as much disposed to call herdsmen and fishermen and send them with the embassy of his word, as he formerly was—And if men, sent of God, are as useful to their fellow creatures, without a legal benefice, as with it: Then it may be safely affirmed that these sentiments do *not* tend to *infidelity.*

Id.

clergy is more likely to come about under establishment than under voluntaryism and acknowledges that this is a favorite argument of Thomas Paine against orthodox Christianity.[440] In response to Paine's deistic attack upon orthodoxy, Leland exalts orthodox Christian doctrine and demeans the establishment of it by the government.[441] The remainder of the pamphlet is a plea for a constitutional convention in Connecticut to replace the royal charter with a thoroughgoing American document.[442] Leland's proposal for the content of a new constitution is an article concerning religious freedom.[443]

440. *Id.* at 29. Leland writes:

> Let us reverse the subject, and enquire whether the doctrine, plead for in this essay, is not well calculated to check infidelity. Is there any *one* cause, since the christian era began, which has contributed so much, to make and support infidels, as the *legal force and violence* that have been exercised in matters of religion? I believe not. In the extensive acquaintance which I have formed in the United States, I know no argument so popular among deists, to support their hypothesis, that, "religion is a cheat;" as those which are drawn from a state established religion. And if I mistake not, *Mr. Paine* has done most execution with this weapon.

Id.

441. *Id.* at 30. Leland's metaphor and explanation read:

> Secular force, in religious concerns, to make christianity appear honorable, is like lacker upon gold or paint upon a diamond. The religion of Jesus disdains such aid. It claims a right to be heard, but forces none to obey. It appeals to the consciences of men by arguments, founded in reason, and not with the arguments of fines, proscriptions, prisons and gibbets. It calls upon men to be citizens of the world, to love all men, even their enemies: and not to confine their benevolence to their sectarian party, be misanthropists to all who do not believe like themselves nor wreak their vengeance on their foes. In fine, the religion of Christ is so divine in its origin—so holy in its genius—so amiable in spirit—and so harmless in doctrine—so pure in its laws—and so rich in its promises: that I feel confident in asserting, "that no man, nor body of men, *under the proper influence of this religion*, ever did or ever will call in the aid of law and sword to support and defend it."

Id.

442. *Id.* at 31–36.

443. *Id.* at 35. Leland's proposed article on religious freedom reads:

> As divine worship is a matter that lies between men and their God, and as religious opinions are not subjects of civil government not any ways under its controul; therefore the legislature of Connecticut shall have no authority under this constitution to establish any kind of religion, force any man to attend or support any order of worship contrary to his own will: but all men shall be left at liberty to worship their God, in that mode which their consciences dictate; free from the disturbances of others. Nor shall any man be proscribed, disgraced, or any ways rendered inelligible to office, on account of his religious opinions. But when any church or religious society shall voluntarily coalesce, and of their own free will, without the force of law, purchase lands or build houses for worship for their social use; they shall be entitled to such lands and houses without molestation.

3. Massachusetts: taking the citadel

Early in his Connecticut campaign, Leland moved to Conway, Massachusetts, to live with his father and was promptly called to minister in Berkshire County in what would become the village of Cheshire. It was on behalf of Cheshire that he escorted the famous twelve-hundred-pound cheese to the nation's capital, a gift to the newly inaugurated President Jefferson that provided additional color, if not context, for the President's "wall of separation" letter to Baptists in Danbury, Connecticut.[444] It was in Cheshire that Leland would live most of his remaining years.[445]

The certificate system of Massachusetts, so despised by Isaac Backus, was the target of Leland's first pamphlet specifically aimed at his home state. Written in 1794 while he was still advocating on behalf of Connecticut Baptists, *The Yankee Spy* addressed the confusion reigning in Massachusetts and (by its title) lent itself overtly to similar problems in New Hampshire, Connecticut, and Vermont.[446] The 1780 Massachusetts constitution had forbidden any change in its provisions for fifteen years.[447] With 1795 fast approaching, Leland wanted to prepare the public for amendments. The pamphlet reads like a catechism, alternating between question and answer, until Leland reaches the subject of a bill of rights at which point he continues in essay form.

In first catechizing the reader, Leland asks questions ranging from the improper application of Old Testament Israel to the New Testament church[448] to the problem with England's unwritten

Id.

444. DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 9–17 (2002); HAMBURGER, *supra* note 20, at 155–80 (discussing Leland and other Baptists and their ambivalence upon receipt of Jefferson's letter).

445. BUTTERFIELD, *supra* note 392, at 202, 205–07, 214–29.

446. JACK NIPS, THE YANKEE SPY: CALCULATED FOR THE RELIGIOUS MERIDIAN OF MASSACHUSETTS, BUT WILL ANSWER FOR NEW HAMPSHIRE, CONNECTICUT, AND VERMONT, WITHOUT ANY MATERIAL ALTERATIONS (1794), *reprinted in* LELAND, *supra* note 409, at 214. Jack Nips was a pen name used by John Leland.

447. BUTTERFIELD, *supra* note 392, at 210.

448. LELAND, *supra* note 409, at 217. This entry reads:

> Q. Has the *ecclesiastical* part of the Mosaic constitution ever been abused as well as the political part?
>
> A. Yes, and that to a great degree. The church of Israel took in the whole nation, and none but that nation: whereas, Christ's church takes no whole nation, but those who fear God and work righteousness in every nation. But almost all Christian nations and states, since the reign of Constantine, have sought to establish

constitution.[449] He praises the Constitution of the United States[450] and disparages the constitution of Massachusetts.[451]

Leland's major concern, however, is with the protections being adopted in a state bill of rights.[452] He acknowledges Madison's original contention that no federal bill of rights was necessary concerning powers not expressly granted in the 1787 Constitution.[453] Leland then points out that with or without a bill of rights, the goodness of the government is more essential than the documents which create it.[454] He then discusses Articles Two and Three of the 1780 Massachusetts constitution and points out the problems with each.[455] He again argues for the protection of

national churches: in order to effect which, they have brought in all the *natural seed* of the professors into the pales of the church, making no difference between the precious and the vile; and from this foundation they have appealed to the laws of state, instead of the laws of Christ, to direct their mode of discipline.

Id.

449. *Id*. at 218.

450. *Id*. at 219–20. Leland writes:

Q. What have you to say about the Federal Constitution of America?

A. It is a novelty in the world: partly confederate, and partly consolidate–partly directly elective, and partly elective one or two removes from the people; but one of the great excellencies of the Constitution is, that no religious test is ever to be required to disqualify any officer in any part of the government. To say that the Constitution is perfect, would be too high an encomium upon the fallibility of the framers of it; yet this may be said, that it is the best national machine that is now in existence.

Id.

451. *Id*. at 220. Leland condemns with faint praise:

Q. What think you of the Constitution of Massachusetts?

A. It is as good a performance as could be expected in a state where religious bigotry and enthusiasm have been so predominant.

Id.

452. *Id*. at 220–29. The response to the question, "What is your opinion of having a *bill of rights* to a constitution of government?" occupies the remainder of the pamphlet.

453. *Id*. at 220. In Leland's words:

[I]n republican, representative governments, like those in America, where it is understood that all power is originally in the *people*, and that all is still retained in their hands, except so much as for a limited time is given to the rulers, where is the propriety of having a bill of rights? In this view, no such bill is found in the Federal Constitution.

Id.

454. *Id*.

455. *Id*. at 220–23. Concerning Article Two, Leland opines:

This article would read much better in a catechism than in a state constitution, and sound more concordant in a pulpit than in a state-house. . . . That it is the duty of men, and women too, to worship God publicly, I heartily believe, but that it is

religiously informed conscience to extend to all citizens, including non-Christians.[456] Finally, Leland lobbies against Sabbath laws[457] and

> the duty or wisdom of a convention or legislature to enjoin it on others, is called in question, and will be, until an instance can be given in the New Testament, that Jesus, or his apostles, gave orders therefor to the rulers of this world. . . . What leads legislators into this error, is confounding *sins* and *crimes* together—making no difference between *moral evil* and *state rebellion*: not considering that a man may be infected with moral evil, and yet be guilty of no crime, punishable by law. If a man worships one God, three Gods, twenty Gods, or no God—if he pays adoration one day in a week, seven days, or no day—wherein does he injure the life, liberty or property of another? Let any or all these actions be supposed to be religious evils of an enormous size, yet they are not crimes to be punished by the laws of state, which extend no further, in justice, than to punish the man who works ill to his neighbor. . . . In short, volumes might be written, and have been written, to show what havoc among men the principle of mixing *sins* and *crimes* together has effected, while men in power have taken their own opinions as infallible tests of right and wrong.

Id. at 220–21. Concerning Article Three, Leland continues:

> If the legislature of this commonwealth have that power to institute and establish that religion, which they believe is the best in the world, by the same rule, all the legislatures of all the commonwealths, states, kingdoms and empires that are in the world, and that have been in the world, may claim the same. . . . [Since Protestants defied the church in Rome, and the Christians defied the pagan government of Rome], how shall all these evils be remedied? answer—all who have dissented from the established religion of New England must return to that fold, and confess their errors; then all must return to the church of England, and submit to that establishment; then, joining with the Episcopalians, all must apply to the Pope for pardon, and submit to his uncontrolable authority; then, with the Papists, all must return to the Pagans, and submit to the Polytheism. If the power spoken of is right, then this mode of procedure is right; and, therefore, it is not the natural consequence of religious establishments by human law, to bring all men under the government and religion of the devil, it is because there is neither devil nor devilish religion in the world. . . . I have long been of the belief that Jesus Christ instituted his worship; and if my faith is well founded, then it is not left for rulers to do in these days; but, surely nothing more can be meant by it, than that the legislature shall incorporate religious societies and oblige them to build houses for public worship. . . . If any number of real saints are incorporated by human law, they cannot be a church of Christ, by virtue of that formation, but a creature of state.

Id. at 221–23.

456. *Id.* at 223–24. Leland writes:

> Should one sect be pampered above others? Should not government protect all kinds of people, of every species of religion, without showing the least partiality? Has not the world had enough proofe of the impolicy and cruelty of favoring a Jew more than a Pagan, Turk, or Christian; or a Christian more than either of them? Why should a man be proscribed, or any wife disgraced, for being a Jew, a Turk, a Pagan, or a Christian of any denomination, when his talents and veracity as a civilian, entitles him to the confidence of the public.

Id.

457. *Id.* at 224–25. Leland writes:

closes with a suggested paragraph on disestablishment in the event of a constitutional convention in 1795.[458]

A Blow at the Root, a sermon given by Leland in 1801, went through several printings[459] and complained of a law passed in 1800 that required communities, in the event of a vacancy in the pulpit, to pay a fine if they did not settle a replacement minister within a few months.[460] The sermon knits together principles found throughout his other writings into a larger argument. It explains the self-discipline necessary in the exercise of true liberty.[461] It distinguishes between "social or political evil" and "moral evil."[462] It defines the

> [T]he appointment of such stated holy-days, is no part of human legislation. I cannot see upon what principle of national right, the people of Massachusetts could invest their legislature with that power; and as I cannot deduce it from the source of natural right, so neither can I find a hint in the New Testament, that Jesus or his apostles, ever reproved any for the neglect of that day; or that they ever called upon civil rulers to make any penal laws about it. . . . But whatever these things are, the legislature of this state is to oblige the people to assemble on these stated times, to hear the instruction of these teachers of piety, religion and morality, if there be any on whose instruction they can conscientiously and conveniently attend. Here is a gap wide enough for any man to creep out. If neglecting to go to meeting is not justified by pleading inconveniency, his conscience will soon do it; but wheter he goes to church or not, his pennies must go to the treasurer's purse.

Id.

458. *Id.* at 229. Leland's proposed constitutional paragraph reads:

> To prevent the evils that have heretofore been occasioned in the world by religious establishments, and to keep up the proper distinction between religious establishments, and to keep up the proper distinction between religion and politics, no religious test shall ever be required as a qualification of any officer, in any department of this government; neither shall the legislature, under this constitution, ever establish any religion by law, give any one sect a preference to another, or force any man in the commonwealth to part with his property for the support of religious worship, or the maintenance of ministers of the gospel.

Id.

459. BUTTERFIELD, *supra* note 392, at 210–11. Butterfield writes, "[This sermon] was printed in at least five different states from Vermont to Georgia, and six editions are recorded." *Id.*

460. *Id.* at 211.

461. JOHN LELAND, A BLOW AT THE ROOT 5 (Bennington, Anthony Haswell 1801). Leland writes, "If we consider that freedom does not authorise one man to destroy the freedom of another; but that freedom is, to be governed by the laws of good order, and that all beside is licentiousness, and tends to bondage in the final event, the seeming contradiction is reconciled." *Id.*

462. *Id.* at 7. Leland explains:

> *Social* or *political evil*, consists in actions only: the philanthropy or turpitude of the heart, the motives, views, or designs of men, are intirely out of the question before this tribunal. The divine government of Jehovah takes cognizance of every exercise of the heart, as well as all external actions; but locial government arrests

proper role of civil government,[463] as well as defining liberty of conscience and explaining why it is inalienable.[464] One note amid the staccato of arguments illustrates the absurdity of legislating religious belief and practice, which are matters of love and faith;[465] another

visible actions only: Hence it appears that all political evils are moral evils; but all moral evils are not political evils. No evil simply moral, is punishable by a political tribunal; yet every political evil comes within the jurisprudence of the Almighty, because it is morally wrong.

Id.

463. *Id*. at 8. Leland's role for civil government reads:

"[I]t is to preserve the lives, liberties and property of the many units that from [read form] the whole body politic." For these valuable purposes, individuals have, in certain cases, to expose their lives (in war) to defend the state; to give up a little of their liberty, and be controled by the general will, and part with a little of their property, to compensate those, who *should* be employed to secure the rest.

Government is (when rightly understood) the most economical mean that men make use of, to secure themselves and be happy.

Id.

464. *Id*. at 10. Leland gives the reason for the inalienability of liberty of conscience before defining it:

Whenever any right, which men possess in a state of nature, is surrendered up to government, it is to be paid, at least, with an equivilent, indeed with some-thing superior; but government cannot reward individuals with any thing equally valuable as the liberty of their conscience.

He who is obliged, by Law, to sin against his own conscience, cannot have his loss made good.

To be definite in expression, by liberty of conscience, I mean the inalienable right that each individual has, of worshiping his God according to the dictates of his conscience, without being prohibited, directed or controlled therein by human law, either in time, place, or manner.

Id.

465. *Id*. at 22–23. Leland quips:

How often have I wished, that when rulers undertake to make laws about religion, they would complete the code; not only make provision for building meeting houses, paying preachers, and forcing people to hear them; but also to enjoin on the hearers, repentance, faith, self-denial, love to God and love to man. That every one who did not repent of his sin, should pay five pounds. That all those who did not believe, should pay ten pounds. That every soul who did not deny himself and take up his cross daily, should pay fifteen pounds. That whoever did not love God with all his heart, should be imprisoned a year. And that if a man did not love his neighbor as himself, he should be confined for life.

That all these duties are taught in the New Testament is certain; if therefore the laws of man are to enjoin moral duties, these important ones should not be neglected: but on only hearing of them, our minds are struck with the absurdity of reducing them to civil legislation and jurisprudence; and had not the poison of antichrist infected the minds of men, they would be equally struck with the idea of making human laws about any religious article.

Id.

note points out that the support of the clergy should be stimulated by the spirit of God, not the law of men.[466] Leland makes it clear that his personal desire is that all citizens of Massachusetts would embrace Christianity, but he is equally emphatic that such belief must be voluntary.[467] He again offers proposed language for the Massachusetts constitution[468] and quotes two speeches by Presbyterians in Virginia that denigrate the very establishment that Presbyterians and Congregationalists were seeking to preserve in Massachusetts.[469]

In a pamphlet published in 1815, Leland again expresses his opinion on Sabbath laws, in addition to theological issues

466. *Id*. at 24. Leland argues, "And the same spirit that influences men to love God, and their neighbours, also influences them to gives willingly, to those who preach the word, and for other necessary uses. Legal force is here inadmissible." *Id*.

467. *Id*. at 26–27. Leland states,

> [A]s a religionist, I wish both articles [belief in both Jesus and Christianity] were believed through this state and throughout the world; yet, as a statesman let me ask, why do they not learn to imitate their God, and regarding the scheme of his government, in which they professedly believe, reason thus with themselves, God bears with wicked men and so must we: God does not force all to believe alike, nor should we attempt it: Jesus never forced any man to pay him for preaching, and we must imitate him.

Id.

468. *Id*. at 34. Leland's proposal reads:

> All men peaceably demeaning themselves, shall be protected by law, in worshiping the deity according to the dictates of their consciences; but the sentiments and creeds of none of them shall be protected by law, but be left to argument and free debate for their support; nor shall there be any provision for any teachers of religion, made by law, nor any religious test required, to qualify an officer for any department of government.

Id.

469. *Id*. at 35. The 1786 address of Zachariah Johnson reads:

> Mr. Chairman, I am a presbyterian, a rigid presbyterian, as we are called: My parents before me were of the same profession; I was educated in that line: Since I became a man, I have examined for myself, and have seen no cause to dissent; But, Sir, the very day that the presbyterians shall be established by law, and become a body politic; the same day *Zachariah Johnson* will be a dissenter: Dissent, from that religion I cannot, in honesty, but from that establishment I will.

Id. The 1780 speech of Colonel J. Innis states:

> Gentlemen, I wish that religion may be as free as the air in which we breath: as uncontrolled as the waters of the boundless sea; that it might extend to the Heavens, to which it tends, and with one universal embrace, within its fostering arms enclose all the progeny of Adam.

Id.

concerning the observance of the Sabbath.[470] On the legal point, Leland puts his principles into practice and breaks ranks with many whom he had joined in fighting the establishment but who now favored civil laws compelling the observance of Sunday as a day of worship.[471] His arguments here, as elsewhere, are consistently amiable towards the religious opinion of those whom Leland personally disagrees.

Leland begins his case with a biblical argument for the voluntary observance of Sunday as a day of worship by pointing out the absence of a command by either Jesus or the Apostles on the subject.[472] After commenting that Constantine's contribution to Christianity was little more than prostituting the church, the Bride of Christ,[473] he reminds the reader that Christian worship had earlier flourished for three centuries in spite of the hostile Roman government.[474] Leland sounds a distinctly modern note when he pleads for "equal protection to all the citizens."[475] In Leland's words:

470. JOHN LELAND, REMARKS ON HOLY TIME, ON MORAL LAW, ON THE CHANGING OF THE DAY, ON SABBATICAL LAWS (Pittsfield, Allen 1815).

471. Butterfield notes that the Baptists were divided on Sabbath laws. Leland opposed on religious grounds both legal enforcement of Sunday worship and the legal prohibition of Sunday mail. Butterfield also mounts a persuasive argument that Leland consulted Richard Mentor Johnson before he compiled and submitted his reports to Congress concerning Sunday mails. BUTTERFIELD, *supra* note 392, at 236–39. On the controversy over the delivery of U.S. mail on Sunday, see JOHN G. WEST, JR., THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION 137–70 (Wilson Carey McWilliams & Lance Banning eds., 1996).

472. LELAND, *supra* note 470, at 16. Leland writes:

> It has been noticed . . . that the first christians assembled in course on the first day of the week . . . and the evidence is about as clear, that it was done voluntarily . . .without any divine command; hence a disregard of the day was not esteemed a matter of offence. . . . If, then, a disregard to the Lord's day was not censurable by the church, can we possibly suppose that it ought to be punished by the laws of state?

Id.

473. *Id.* at 17–18. Leland proposes:

> [I]t is generally confessed, that when the event did take place—when Constantine the Great established Christianity in the empire, and *forced* an observance of the first day of the week, that Christianity was disrobed of her virgin beauty and prostituted to the unhallowed principle of state policy, where it has remained in a criminal commerce until the present moment.

Id.

474. *Id.* at 18. In response to the argument that not enforcing Sabbath laws would ruin its observance, Leland asks, "Why did it not then run out in the three first centuries? How came it to be regarded all that time as purely as it has ever been since?" *Id.*

475. *Id.*

> Government should be so formed as to administer equal protection to all the citizens within its limits.—It is not only supposable, but fact, that within our government, there are Jews, Turks, and Christians of various peculiarities, as well as those who believe in no revealed religion. Local situation has placed them together—their interests and fears are common. All of them have life, rights and property to be secured—they associate for mutual defence, and form what is called government; for the support of which each one pays his equal part. In this case, ought not government to be a *nursing father* to all of them?[476]

He asserts that Christ, as head of the church, has ordained persuasion as his weapon of choice, rather than coercion.[477] Lest anyone think Leland irreligious, he shares his personal religious belief concerning those who would neglect the regular worship of God;[478] but he quickly offers his political opinion concerning the use of civil

476. *Id.*

477. *Id.* at 19. Leland points out:

> *Legal force* is not the armor, with which the Captain of our salvation clothes the soldiers of the cross. An honest appeal to the reasons and judgments of men, is all the force that Christians should use to induce others to believe in and worship God as they themselves do. All the punishment that pious Christians inflict on the irreligious, is *pity, forgiveness* and *prayer*; unless the irreligious man breaks out into overt acts; in which case he is to be punished according to his crime. If labor or amusements, on the *first day of the week,* may be considered as the foulest *sins*, yet they were no *crimes* to be punished by law, for the first 300 years after Christ; nor are they, at this time, *crimes* in several of the states in our country; and if laws were fixed as they should be, they would not be *crimes* any where. If those who keep the first day of the week, in remembrance of the resurrection of Christ, believe themselves to be right (as they have cause to) let them *beseech others by the mercies of God, to present their bodies a living sacrifice to God, which is a reasonable service* (Rom. xii. 1) and not make use of legal force to do it, which will only prejudice others against the day and against themselves.

Id.

478. *Id.* at 21. Leland confesses:

> When I see men turn their backs upon public worship and pursue their labor or recreation in preference to the service of God, either on Sunday or on any other day, my heart beats in poetic strains,
>
> "O might they at last, with sorrow return,
> The pleasures to taste, for which they were born,
> The Saviour receiving, the happiness prove,
> The joy of believing, the heaven of love."
>
> Or break out in the language of the Hebrew prophet, "Oh that they were wise, that they understood this, that they would consider their latter end!" Or vents itself in the words of Paul, "I pray you in Christ's stead be you reconciled to God."

Id.

government to enforce such sentiments.[479] As he draws these arguments toward their conclusion, Leland points out the illogic of compelling a law enforcement official charged with enforcing the Sabbath law to violate his religious conscience on Sunday in order to arrest another whose conscience is not so inclined.[480]

Although the electorate earlier failed to provide the necessary two-thirds vote for a constitutional convention in 1795, Leland wasted no time in taking his case to the public when delegates were called upon for constitutional revisions in 1820.[481] *Short Essays on Government* was published that year and revisits Leland's now standard arguments, as well as proposing new language for the Massachusetts constitution.[482] The plain-spoken style and uncomplicated logic characteristic of Leland are again evident.

While the arguments are familiar, a few of Leland's points are worth revisiting. He reminds the reader that Christianity was constituted in the midst of the pagan government of Rome, yet Jesus instructed his followers to obey the civil authority.[483] He challenges

479. *Id*. Leland continues,

> But when I see a man with the insignia of his office, arrest a fellow-man for non-attendance on worship, or labor or amusement on Sunday, it strains every fibre of my soul. Who that ever read the New Testament, which describes the meekness, patience, forbearance and sufferings of the first Christians, would ever have expected to see those who call themselves Christians, avail themselves with such weapons, to suppress vice and support Christian morality?

Id.

480. *Id*. at 22. Leland writes,

> But how must a tything-man feel? The day he conceives to be holy—no civil or economic business must be done on the sacred day—devotion must employ his time and his thoughts; and yet his office is *civil*; he receives his authority from the *acts* of the legislature, and not from the *acts* of the apostles; and his oath obliges him to profane the day, which he conceives to be holy, by performing *civil* actions; for he has no authority to officiate, except on the time which is holy. When he rises on Sunday morning, instead of having his mind disentangled with earthly things, he is watching the fields and the roads—when going to meeting, instead of watching to prepare his heart for the solemnities of the day, he is watching how others behave—when at meeting, his eyes and his ears, which should be open alone to God and to his word, are constantly looking and harking to prevent the errors of others. And thus, by law, he is obliged to do evil that good may come.

Id.

481. BUTTERFIELD, *supra* note 392, at 210–14.

482. *Id*. at 213 n.133.

483. JOHN LELAND, SHORT ESSAYS ON GOVERNMENT (1820), *reprinted in* LELAND, *supra* note 409, at 474. Leland writes:

> The conclusion is, that the *powers* that were in existence when Christianity was set up, *were of God*, although in the hands of heathens. To these powers, the Christians

the notion that Christian nations are more productive or virtuous than their pagan antecedents.[484] Leland argues that from its earliest day, Christianity asked only for an opportunity to be heard, and still managed to topple the Roman Empire.[485] He believes the darkest day for the Christian faith was the day Constantine I bestowed civil favor upon the church.[486] Leland points out that established religion is ultimately a religion controlled by irreligious persons,[487] and

were commanded to submit: not to speak evil of dignities, but pray for all in authority, knowing that magistrates are God's ministers, set for the punishment of evil doers, and the praise of them who do well. How undeniable the fact, that civil government is not founded on Christianity.

Id.

484. *Id.* at 475. In Leland's words:

Can Christian nations produce greater geniuses than Greece and Athens—more superb cities than Babylon and Nineveh—or more flourishing commerce than Tyrus? Was there ever a more unjust and cruel conquest than that of Spain over South America? Or when was there ever a confederation of Goths, Vandals and Moors, more unreasonable, mischievous and disasterous, than the crusades, etc., etc.

If simple Christianity is all innocent and interesting, and yet the most horrid evils have existed, and do still exist, in Christian kingdoms and states, the cause should be sought for, and shunned.

Id.

485. *Id.* at 476. Leland posits:

Christianity was introduced in a peaceable, harmless manner: it asked only for a dispassionate hearing, with a correspondent faith, grounded on facts and undeniable evidence. And, by appealing to the reason and judgment of men, without being armed with royal edicts, military force, or aided by the college, and the wisdom of this world; but, in opposition to all of them, it prevailed with that astonishing rapidity, that, in less than three hundred years, it overturned an empire that claimed universal sway.

Id.

486. *Id.* Leland explains:

All these things together made the Christians shine like carbuncles. The error of Constantine did not exist in his delivering the Christians from the bloody hands of Pagans. So far he was right. But his great error was giving the same fatal dagger, which the Pagans had used, unto the Christians, who soon used it with as bloody hands.

That Constantine founded his government on Christianity, is certain; for he allowed none but Christians to bear rule. That Christianity was disrobed of apostolical order, and ravished of her virgin chastity, by this establishment, cannot be confuted. By the *imperial Christian* establishment, arose the shocking monster of *Christian nation*.

Id.

487. *Id.* Leland opines:

When Christianity becomes national, a majority who govern the church will be ungodly men, and have recourse to law and coercive measures to regulate religion; and, as all men are not stamped in the mill of uniformity, the strongest party will oppress the weakest.

government is best when impartial in dealing with all religions.[488] Concerning the internal conflict in Article Three of the current constitution, Leland offers another of his witty illustrations,[489] and he closes the pamphlet with a proposed amendment for the 1820 constitution.[490]

Although Leland fought vigorously against any legislation favoring the church, he had no qualms about a robust involvement of the church or her members in political activity. Leland himself was

Id.

488. *Id.* Leland writes:

> Government is the formation of an association of individuals, by mutual agreement, for mutual defence and advantage; to be governed by specific rules. And, when rightly formed, it embraces Pagans, Jews, Mahometans and Christians, within its fostering arms—prescribes no creed of faith for either of them—proscribes none of them for being heretics, promotes the man of talents and integrity, without inquiring after his religion—impartially protects all of them—punishes the man who works ill to his neighbor, let his faith and motives be what they may. Who, but tyrants, knaves and devils, can object to such government?

Id.

489. *Id.* at 478. In reference to Article Three, Leland quips:

> When I read of the investure of the legislature, and how the power invested in that body is to operate, (treated of in the fore part of the third article,) and compare it with the last clause in the same article, I am involuntarily led to reflect on the prayer of a man, who sometimes prayed for the Lord to reign, and at other times, that the devil might triumph. When he was asked, why he prayed both ways, he answered, he did not know which of the two would prevail, and therefore chose to keep friends on both sides.

Id.

490. *Id.* at 479. Leland's proposal reads:

> The legislature of this commonwealth shall have no power to establish any kind of religion, either in the object of adoration, creed or faith, forms of worship, or times of service; but all men shall be left free to worship their God according to the dictates of their conscience.
>
> No man shall be considered a member of any religious society, or any way bound to support the worship or teachers thereof, until he has voluntarily joined himself therewith. And, if he sees causes to leave the society which he has joined, by lodging a written cirtificate with the clerk of said society, of his intentions, he shall not be holden to pay anything for the support of that society, or the teacher thereof, which shall be assessed after the date of his cirtificate.
>
> No man's religious opinions, shall, in any wise, effect his civil capacity; but every man shall be encouraged to declare his sentiments, and by argument, support them.
>
> No religious test or declaration shall ever be required to qualify a man to fill any post of office or trust in the commonwealth.
>
> If any man, under religious pretence, disturbs the peace, or commits any overt act, he shall be punished by law for his transgression, and pitied for his heresy.

Id.

elected to the Massachusetts General Assembly for one term.[491] He was also active in campaigning for the Republicans and against the Federalists. Butterfield refers to local histories which depicted Leland "as leading his Baptist flock to the polls to cast their votes as one man for all Democratic-Republican candidates."[492] In the years from 1800 to 1808, the strongest showing of a Federalist candidate for governor in Leland's district was 3 votes out of 194.[493] Leland was also a regular contributor to the *Pittsfield Sun*, a newspaper printed by his friend, Phinehas Allen, and devoted to Democratic-Republican political views.[494] This political activity was in full harmony with Leland's policy of employing persuasive power while renouncing legal coercion.

An undated essay nicely summarizes Leland's theory of the proper relationship of church and state beginning with the fate of Christianity from the first century forward:

> It was left for the United States of North America, to give the example to the world; to draw the proper line between church and state, religion and politics. Yes, from the beginning of Christianity, down to the close of the eighteenth century, A.D. it never prevailed among a people, of any considerable consequence, but they would either punish or pamper it almost to death: either proscribe it, or make it a principle of state policy. To say that the government of the United States is perfect, would be arrogant; but I have no hesitancy in saying, that the Constitution has left religion *infallibly* where it should be left in all government, viz: in the hands of its author, as a matter between God and individuals; leaving an open door for Pagans, Turks, Jews or Christians, to fill any office in the government, without any religious test, to make them hypocrites: securing to every man his right of argument and free debate: not considering religious opinions objects of civil government, or any ways under its control: duly appreciating that Christianity is not a

491. BUTTERFIELD, *supra* note 392, at 212. Butterfield quotes a letter by Leland saying:

> Thro' strong persuasion I was tucked into the Legislature two years; and learned from experience what I had surmised before; that my conscience was not long enough for a legislator. I gained no evidence that the legislature of Massachusetts had inspiration enough sufficient to legislate about souls, conscience or eternity.

Id. at 213 n.132 (quoting a Leland letter to S.M. Noel dated June 17, 1831).

492. *Id*. at 214.

493. *Id*. at 215–16. Butterfield reports similar results in the election of federal representatives. *Id*. at 216.

494. *Id*. at 216.

> scheme of coercion; but only calls for a patient hearing, a dispassionate examination and a rational faith.[495]

The national constitutional provision Leland references is the Religious Test Clause in Article VI, Section 3, not the First Amendment. Yet he reads the general silence of the U.S. Constitution on the matter of religion as the government having no authority over it, such jurisdiction lying with God. In this sense, government regards all religions as equal. Moreover, he reads the Constitution as leaving all citizens, religious or not, free of governmental coercion in religious concernments and yet secure in their right of free debate in all matters, including that of religious opinion.

John Leland was seventy-nine years old when Massachusetts completed the process of disestablishment in 1833. His contribution, like the final triumph in Massachusetts, was a steady persistence in forcing those in power to deal with the inconsistency between the old regime and the new ways of thinking about religion which focused on voluntariness and the spiritual role of the church. For Leland, the experiences in Virginia and the education received from observing James Madison were a crucial beginning to his work that would mature in Connecticut and come to fruition in Massachusetts.

D. Congregational Disestablishment: New England

The story of disestablishment in New England is, among its other subtexts, one of overcoming inertia. While early efforts produced little movement, the cumulative effect of over a century of dissent was the fall of New England's Standing Order. This was no more imaginable to John Adams in 1775 than was dislodging the planets from their orbits in the solar system.[496] For Massachusetts, the little-known writings of the banished Roger Williams would feed the passions of Isaac Backus, which in turn supplied the momentum for John Leland and like dissenters to finish the task. The events in New England, along with New York, Maryland, Virginia, and the Deep South, illustrate the very idea of disestablishment as a state-by-state process. What began as the plea for a mere toleration of dissent

495. JOHN LELAND, NUMBER ELEVEN: NIMROD, MOSES, CHRIST, AND THE UNITED STATES, *in* LELAND, *supra* note 409, at 428.

496. *See supra* text accompanying note 169.

grew into a demand for full freedom of conscience and later became an insistence that there be no state power over matters within the sphere of the church. The beliefs and arguments of the various figures who drove this process onward evolved from quiet resistance to confident demands by Baptists, "new light" and "new side" Presbyterians, as well as Methodists and other revivalists, culminating in full religious freedom.

Of course, neither the opponents of voluntaryism nor their ideas immediately went away as of 1833. Those ideas still held sway with some and were at times accommodated. While it would take over a century and a half to conform practice to principle, the American settlement of church-state relations was the norm after 1833. And, as noted above, it was the Second Great Awakening that swelled the ranks of the new Protestant denominations that eagerly embraced the adoption of voluntaryism. Before returning to that theme, we march state by state, except for Connecticut and Massachusetts (already touched on above), through the process of disestablishment in New England.

1. Vermont

Throughout the eighteenth century, Vermont was the focal point of conflicting territorial claims and political controversy. Its geographic location made it susceptible to clashes between Britain and France as well as between rival colonial governments.[497] In 1713, after the resolution of a dispute between Massachusetts and Connecticut, emigrants from the Bay Colony began settling the southeast corner of this wild territory.[498] Meanwhile, New

497. Vermont's location southeast of Lake Champlain made it the site of numerous clashes between the British and French colonizers of the New World. Settlement of the Green Mountain region by the British did not start in earnest until 1760 when Great Britain had finally secured control over Canada. 2 ZADOCK THOMPSON, HISTORY OF VERMONT, NATURAL, CIVIL AND STATISTICAL 16, 29 (Burlington, Goodrich 1842).

498. Due to vague language in the patents, Massachusetts and Connecticut had granted lands that the other claimed as their own. When the border was finally fixed and agreed upon, both colonies agreed that the other could retain any settlements that were historically theirs but on the wrong side of the agreed upon border. In compensation, the offending colony would grant to the other "Equivalent Lands." Massachusetts subsequently granted to Connecticut 107,000 acres of land, 44,000 acres of which were west of the Connecticut river in southeastern Vermont. Connecticut sold the lands at an auction to raise funds for Yale College, and the real estate ended up in the hands of speculators from Massachusetts. One of the settlements started by these speculators was manned by a Lieutenant Dwight, whose son Timothy Dwight would be born in the Green Mountain Territory and would one day become

Hampshire gave out grants of large portions of Vermont territory even as New York claimed legal title.[499] The population mix was a class of rugged and independent settlers,[500] many of whom had come to these lands to avoid religious establishments elsewhere in New England.[501] In 1777, they declared an independent commonwealth under the name Vermont.[502] Vermont's record on church and state is both richer and longer than many would suppose given that it was not one of the original thirteen states.

The 1777 constitution of Vermont was modeled after that of Pennsylvania.[503] While modifications to the Pennsylvania document created a de jure multiestablishment of Protestantism,[504] it was very

president of Yale and mentor to Lyman Beecher. MATT BUSHNELL JONES, VERMONT IN THE MAKING, 1750–1777, at 6–12 (1939).

499. *Id.* at 42. According to Jones, Governor Benning Wentworth of New Hampshire began granting land immediately after the fall of Montreal in 1760, and, by 1765, had made over 120 grants resulting in 28 townships in what is now Vermont. *Id.*

500. One author writes:

> The settlers on the New Hampshire grants were a brave, hardy, but uncultivated race of men. They knew little of the etiquette of refined society, were blessed with few of the advantages of education and were destitute of the elegancies, and in most cases of the common conveniences of life. They were sensible that they must rely upon the labor of their own hands for their daily subsistence, and for the accumulation of property. They possessed minds which were naturally strong and active, and they were aroused to the exercise of their highest energies by the difficulties, which they were compelled to encounter. . . . Though unskilled in the rules of logic, their reasoning was strong and conclusive, and they pressed the courage and perseverance necessary for carrying their plans and decisions into execution.

2 THOMPSON, *supra* note 497, at 30.

501. 2 MCLOUGHLIN, *supra* note 76, at 790. McLoughlin asserts, "Among these poor but stubborn and self-willed emigrants evidence sustains the view of a high percentage of religious dissenters and radicals—persons who, if asked, would have said that one reason for their emigration was to escape the ecclesiastical confinements of the Massachusetts and Connecticut systems." *Id.*

502. *See generally* VT. CONST. of 1777, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3737, 3740.

503. HILAND HALL, THE HISTORY OF VERMONT FROM ITS DISCOVERY TO ITS ADMISSION INTO THE UNION IN 1791, at 268 (Albany, Munsell 1868).

504. VT. CONST. of 1777, *reprinted in* 6 CONSTITUTIONS, *supra* note 230, at 3737, 3740. Article Three simply states that "no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience." *Id.* Although protective of individual free exercise, Article Three did not prohibit the state from requiring an individual to support his own church.

mild in its implementation.[505] Against a backdrop of expansive local autonomy,[506] in 1781 the Vermont legislature enacted a religious tax familiar to Congregationalism elsewhere in New England, later clarified in 1783.[507] Although leaving the tax unchanged, in 1786 a new constitution expanded religious liberty to include Catholics.[508] A religious test for holding public office, as well as a required oath still effectively excluded deists, Jews, and Universalists.[509] An act in 1787 created a certificate system, similar to that in Massachusetts, in which dissenters could escape the religious tax only by presenting officials

505. Compare, for instance, the vigorous attacks of the Baptists under Isaac Backus' leadership in Massachusetts on the certificate system discussed earlier in this paper to the general ennui of Vermont Baptists under the certificate laws of 1783 and 1787. 2 MCLOUGHLIN, *supra* note 76, at 797–803. Even Backus reported, "There is such a mixture [of religious views] in Vermont . . . that I have no account of great sufferings there." *Id.* at 795 (quoting ISAAC BACKUS, AN ABRIDGEMENT OF THE CHURCH HISTORY OF NEW ENGLAND 218 (1804)).

506. NEVINS, *supra* note 360, at 579. Nevins explains the nature of local autonomy in the context of the New York/New Hampshire land grant dispute by saying:

> Populated in large part by men from Massachusetts and Connecticut, and remote from the capitals of New Hampshire and New York, the Vermont towns had developed a purely democratic government which made them so many little republics. They were attached to their town-meeting autonomy.

Id.; *see also* 2 MCLOUGHLIN, *supra* note 76, at 790–91. In McLoughlin's words:

> On the frontier, Baptists and Congregationalists shared their hardships and resources, attended the same limited social and religious functions, permitted their children to intermarry, accepted each other as business equals, and ignored denominational distinctions in choosing the best available men for political leadership. From 1779 to 1781 a Baptist was the lieutenant governor of the state; in 1813–1814 a Baptist was sent to Congress as state representative, and finally, in 1826, a Baptist was elected to the governorship. And from its founding in 1791, Baptists were also given a share of the appointments to the board of trustees of Vermont University. That at last such possibilities were open to them in New England was a climactic turning point in Baptist history and a symbol of the final disintegration of the Puritan closed society. This openness at the top was proof of equal openness below.

Id. at 791.

507. 2 MCLOUGHLIN, *supra* note 76, at 797–98. The 1781 law simply provided for local religious taxation which was already taking place. The 1783 clarification provided the mechanism by which the religious tax was to be collected and dissenters were to be exempted. *Id.*

508. *Id.* at 800–01. Article Three was edited, omitting "who profess the protestant Religion," which broadened the pale of protection to include Catholics. *Id.* at 800.

509. *Id.* The oath required a belief in both the Old and New Testaments, which neither deists nor Jews could swear to, as well as a belief in punishment in hell, which was objectionable to Universalists. *Id.*

with a certificate from their church.[510] In 1797, the legislature reenacted the 1787 certificate system but specified the terms of the certificate.[511] The 1797 act was challenged in 1800 and found by the Council of Censors to be "repugnant" to Vermont's Declaration of Rights.[512] Attempts to repeal the law were brought to the legislature in 1806 and succeeded in 1807 after the Council of Censors had again found the law unconstitutional.[513]

Although some bemoaned the 1807 disestablishment,[514] David Benedict, who succeeded Isaac Backus as the official historian for the New England Baptists,[515] held up Vermont as an example to other New England states when he wrote:

> Many had very alarming apprehensions of the leveling consequences of [disestablishment]; none of them, however, have been realized. There were [as of 1807] about a hundred Congregational ministers settled in this State, but not one of them was displaced in consequence of this law. They were a worthy set of men, and as soon as their churches and congregations saw the law was repealed which empowered them to raise money for their support, they set about raising it in other ways, and all of them were supported as well without law as they had been with.[516]

While the policy of no-establishment was effective as of 1807, litigation to settle title disputes concerning previous grants of property for church use (glebe lands) continued for several years.[517]

510. *Id*. at 801. The most significant difference between Massachusetts' certificate system and the one enacted in Vermont was social rather than juridical. The interdependence that existed among persons of various sects in Vermont defused the social stigma that certificates evoked in Massachusetts. Consequently, the Baptists of Vermont put up little resistance to the certificate law until 1794. *Id*. at 801–03.

511. *Id*. at 807.

512. *Id*. The Council suggested that the law be "altered or abolished," and the legislature chose to reform the statute by allowing dissenters to draft their own certificates. *Id*. at 807–08.

513. *Id*. at 810. Ezra Butler, a member of the Council of Censors, and Aaron Leland, the Speaker of the House, were both itinerant Baptist preachers who were actively serving their churches even while serving in public office. The repeal of religious taxation in Vermont was in large part due to the efforts of these two men. *Id*. at 809–10.

514. McLoughlin quotes the diary of Rev. Thomas Robbins, a Congregationalist from Connecticut, as stating, "The Legislature of [Vermont] have lately annulled all their laws for the support of the gospel. We have almost ceased to be a Christian nation." *Id*. at 811.

515. *Id*. at 795.

516. *Id*. at 811 (quoting 1 DAVID BENEDICT, A GENERAL HISTORY OF THE BAPTIST DENOMINATION IN AMERICA 351 (1813)).

517. During his twenty-five years as governor of the colony, Benning Wentworth, an Anglican churchman and Tory, conveyed over one hundred land grants on both sides of the

Before the War of Independence, the grant of glebes was highly unpopular because the grants specifically benefited only the Anglican Church. It is reported that surveys of Vermont lands routinely located the glebe "in swamps, on mountain tops, and in the bottoms of lakes."[518] While the glebe issue is often seen as an establishment today, in 1807 it was viewed differently, even by Baptists.[519] The

Connecticut River. Each grant included five hundred acres reserved to him personally and one part each reserved for a church, a settlement for a minister, and lease land for the Society for the Propagation of the Gospel. *See* 10 DICTIONARY OF AMERICAN BIOGRAPHY 653–54 (Dumas Malone ed., 1936); 2 THOMPSON, *supra* note 497, at 18. When the colonies declared their independence in 1776, title to the king's land passed to the now independent states. In the case of Vermont, title to its territory was nebulous until 1791 when it was admitted into the Union as the fourteenth state. In 1794 and 1805, Vermont's government renewed the original grants of Wentworth, but designated schools or, alternatively, equal benefit to all religious sects as beneficiaries instead of the Church of England. 2 MCLOUGHLIN, *supra* note 76, at 819 n.12. In the years that followed, considerable controversy focused on these lands as various denominations fought over who should benefit from their lease profits and who was entitled to erect churches on them. *Id.* at 819 n.12.

518. MCCONNELL, *supra* note 301, at 190–91. McConnell records the following:

> When New Hampshire, with its territorial appendage Vermont, had a Churchman for its governor at the middle of the century, it was determined to endow the Church from its public lands. A half-section in each township in Vermont was set apart for this purpose, but the people from whom the surveyors were taken being hostile, the sections were located in swamps, on mountain tops, and in the bottoms of lakes, so that but little else came of it than came of all similar attempts; that is, the ill-will of the people and small gain to the Church.

Id. Running a close second to this complaint was Gov. Wentworth's accumulation of personal wealth by means of reserving over 100,000 acres of land for his personal enrichment. NEVINS, *supra* note 360, at 23–24.

519. 2 MCLOUGHLIN, *supra* note 76, at 816. McLoughlin reports:

> Although religious taxes were not a serious problem in Vermont, another church-state issue frequently did involve the Baptists in quarrels with the Congregationalists. These arose over their conflicting claims to the "minister's right" and the "ministry lands," or what were popularly called the "glebe lands" in the various towns. The significance of these disputes lies not so much in the realm of persecution or prejudice as in the inconsistency of the Baptist position toward separation of church and state. For the Baptists were not only willing but eager to obtain land from the towns to aid them in the support of their ministers and churches and in certain cases they claimed it as their right. This issue underscores again the New England Baptists' belief that the state had a duty to encourage religion rather than to maintain a high wall of separation which might encourage secularism.

Id. The "inconsistency" of the Baptists might also be explained as a claim to title as opposed to an expectation of state support. The church building and property played a central role in these early communities (e.g., a school, cemetery, town hall, etc.). In a settlement populated by Baptists who qualified for the grant, a suit to obtain clear title to property would be logical and expected. Since the grant was a historical reality and not a present or proposed act of the government, the Baptists can hardly be accused of duplicity concerning church-state relations.

glebe lands had been granted for some time before the litigation started. Hence, if the land had long been claimed by a church according to the grant it was generally thought the church should keep it. Land granted but not yet claimed by a church, however, posed the problem of who should benefit in the future. One such suit was resolved by the U.S. Supreme Court when it held that property not claimed and settled by the Church of England by the time independence was declared had rightfully passed from the king to the government of the state.[520]

2. New Hampshire

New Hampshire's religious history is an evolution of ideas and influences in what was a wild and generally undeveloped region.[521] The land was initially explored by (and granted by the English crown to) Sir Ferdinando Gorges and Captain John Mason.[522] Mason eventually became entitled to the New Hampshire lands,[523] and later his heirs took up the fight against neighboring Massachusetts for control of the territory.[524] The result of this struggle was the purchase of the District of Maine by Massachusetts from the heirs of Gorges in 1677[525] and an order from the Massachusetts Privy

520. *See* Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292 (1815). It is significant that this dispute concerned the original grant of 1761 and the Vermont statute of 1805, but not new grants after 1807 that favored the church. Presumably the 1807 disestablishment would have prevented any such favoritism.

521. Considering that New Hampshire initially included the territory of what is now Vermont, the four well-developed towns bunched near New Hampshire's short coastline left an overabundance of undeveloped property to the West for exploration and settlement. *See* NANCY COFFEY HEFFERNAN & ANN PAGE STECKER, NEW HAMPSHIRE: CROSSCURRENTS IN ITS DEVELOPMENT 72–73 (1986).

522. JERE R. DANIELL, COLONIAL NEW HAMPSHIRE: A HISTORY 17 (1981).

523. *Id.* at 22. Mason made arrangements to split Maine into two portions, the southernmost belonging to Mason and named New Hampshire after the county of Hampshire in England where his estates were situated. *Id.*

524. *See id.* at 73–79.

525. *Id.* at 76. Daniell contends as follows:

> In defiance of Privy Council orders, [the agents of Massachusetts] helped negotiate the outright purchase of Maine from Gorges. Since the chief justices had acknowledged Gorges' right to government within his patent, the agents felt they could probably convince the lords to give Massachusetts formal jurisdiction over the four towns; the logic of geography, if nothing else, supported such a conclusion.

Id.

Council for citizens of Massachusetts to withdraw from New Hampshire in 1679.[526]

Thereafter, a series of royal governors, with varying zeal, attempted to improve the condition of the Anglican Church in the colony.[527] The Congregationalists, who had been in control when Massachusetts asserted authority, continued to exert considerable influence.[528] However, a steady influx of Anglicans,[529] Baptists,[530] Presbyterians,[531] and Quakers,[532] and the shift in public sentiment

526. *Id*. at 76–78. Through the shrewd political tactics of Robert Mason and Edward Randolph, helped along by the overconfidence of the Massachusetts Bay Colony leadership, New England geography showed Massachusetts to be two territories divided by New Hampshire's tiny access to the Atlantic. *Id*. This geographic divide would later provide the District of Maine leverage in seeking autonomy.

527. 2 MCLOUGHLIN, *supra* note 76, at 835. McLoughlin reports that Puritan ideals and practices were too entrenched in New Hampshire for these efforts to bear much fruit. That the effort was made at all is more a result of English politics than a desire to foster Anglican religious sentiments in New England. The restored Charles II was eager to reinvigorate the Anglican faith after the collapse of Cromwell's Protectorate and the Presbyterian Roundheads associated with it. In fact, from 1682 to 1685 the New Hampshire Puritans were actually forced to plead for liberty of conscience mere miles from their stronghold of Massachusetts. While the Congregationalists saw their opportunity to regain control after the Glorious Revolution of 1688, William and Mary quashed that hope by appointing another royal governor. However, the new monarchs were not as eager to buttress the Church of England in the New World as Charles II had been. Consequently, while the Congregationalists retained considerable influence in the colony, New Hampshire would henceforth follow a trajectory different from Massachusetts. *Id*.

528. *Id*. at 835–38. The laws concerning taxes for the support of religion in New Hampshire were modeled after the Massachusetts ecclesiastical laws. While there were significant modifications, the spirit of church-state relations in this colony and later state continued to take cues from the situation in the Bay Colony into the nineteenth century. *Id*.

529. The Anglicans, after having been suppressed by the Puritans for ninety years, erected Queen's Chapel in Portsmouth and consecrated it in 1734. Rev. Arthur Browne was settled as the rector of this new Anglican parish and was paid largely by funds from the Society for the Propagation of the Gospel. CHARLES B. KINNEY, JR., CHURCH & STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE 1630–1900, at 49–50 (1955).

530. Before 1770, the only Baptist church in New Hampshire was settled in Newton in 1755. This congregation fought long and hard for relief from religious taxes levied to support the Congregational Church in that town. While the Baptist congregation was dissolved in 1768, the controversy reached fever pitch when the Baptists and Quakers joined forces and outvoted the Congregationalists in granting themselves an exemption. The colonial legislature voided the election considering the circumstances, but in 1770 Congregational leaders in Newton decided it wiser to grant the exemption than continue the fighting. Also in that year, the Baptists founded two churches, and they had forty-one churches in New Hampshire by 1795. 2 MCLOUGHLIN, *supra* note 76, at 842–43.

531. After the end of Queen Anne's war in 1713, large numbers of Scotch-Irish immigrants were arriving in the colonies, and the interior of New Hampshire was growing more appealing as French and Indian threats to security decreased. After being rejected in Massachusetts, a petition signed by about one hundred settlers was submitted to New

occasioned by the First Great Awakening,[533] soon created an environment more conducive to toleration and local religious autonomy.[534]

This is not to say that New Hampshire parted easily with its establishmentarian sentiments. The colonial governors, while attempting to advance the Anglican cause, were forced to tread lightly due to entrenched control by Congregationalists.[535] After independence was declared in 1776, New Hampshire adopted its first constitution in 1781.[536] New Hampshire borrowed the language

Hampshire in 1719. After being tabled due to questions of jurisdictional powers, the Scotch-Irish, who now numbered over three hundred, resubmitted their petition and were granted the Londonderry Charter in 1721. KINNEY, *supra* note 529, at 50–51.

532. The Quakers were much more successful in New Hampshire than in the southern reaches of New England. By early 1729 they had effectively been assimilated into the body politic and had even petitioned the Governor for permission not to collect religious assessment when serving as constables. This exception was granted in 1731 when the colonial government provided for a "Constable, to gather the Ministers Rates" in cases where the actual constable was a Quaker. Five years later they would ask for and receive an exception from swearing oaths. *Id*. at 48–49.

533. Exeter is an example of the impact of the Great Awakening. Forty-four people dissented when an associate minister was called by the town, all of whom separated from the Congregational Church and constituted their own body in 1743. The assembly of "New Lights" repeatedly petitioned for exemption from supporting the "Old Light" minister, each petition being tabled and allowed to die in committee by the legislature. In 1744 George Whitefield was prevented from preaching in Exeter by the standing minister. Finally, in 1755, the House of Representatives allowed for separate parishes within the town and gave each citizen of majority age three months to determine which congregation she wanted to support. *Id*. at 61–62.

534. *Id*. at 79. Kinney explains:

> Because of the scattered nature of the settlements and because of the tremendous power vested in local government, it is impossible to conclude that New Hampshire had a single established church, that New Hampshire had a multiple establishment, or that there was any legal establishment at all. In some of the northern towns the voters often had no preaching, because they could not agree upon a single tax-supported church.

Id.

535. *Id*. at 68. Kinney states, "[Governor] Benning Wentworth was politically astute enough to realize that it would be impossible for him to go the limit for the weak Church of England and at the same time make no provision for what was more often the established order in the towns of the province." *Id*.

536. While this constitution was technically the first for New Hampshire, the state had been operating on a hastily drawn quasi-constitution created to fill the vacuum caused by Governor John Wentworth's flight from the colony and the ensuing collapse of the royal government. Since New Hampshire had no charter upon which to rely, delegates from local communities assembled themselves as a "House of Representatives" and, in 1776, constituted a government that lacked both judiciary and executive components. DANIELL, *supra* note 522,

of the Massachusetts constitution in formulating laws in support of religion but with a few significant modifications.[537]

While dissenters had gained more ground in New Hampshire than in either Massachusetts or Connecticut,[538] it was Connecticut's disestablishment in 1818 that motivated New Hampshire to adopt the Toleration Act of 1819.[539] This act effectively ended religious

at 229, 237, 242. This government kept New Hampshire operating until the 1781 constitution took effect. 2 MCLOUGHLIN, *supra* note 76, at 844.

537. 2 MCLOUGHLIN, *supra* note 76, at 844–45. The New Hampshire Constitution of 1781 addressed religion in articles four, five, and six, which were modeled after articles two and three of the Massachusetts Constitution. McLoughlin addresses three variations between these documents:

> The first and most obvious is the omission in the New Hampshire articles of the important paragraph dealing with right of dissenters to have their religious taxes paid to the teacher of their own sect; instead the omission seems clearly to grant to dissenters the right of exemption from paying religious taxes at all. Second, and equally important, where Article Three of the Massachusetts Bill of Rights gave the legislature the power "to authorize and require" the towns and parishes to make suitable provision for public worship, Article Six of the New Hampshire Bill of Rights gave the legislature only the right to "authorize" such action; by explicitly omitting the word "require" it granted the towns and parishes the right of local option in levying religious taxes. Third, the New Hampshire Bill of Rights did not contain any clause authorizing the legislature to require the inhabitants to attend public worship.

Id. at 845.

538. *Id*. at 833–34. McLoughlin summarizes the situation in New Hampshire as follows:

> The dissenters in New Hampshire, like those in Vermont, encountered less difficulty than their brethren in Massachusetts and Connecticut. Religious liberty in that area of New England evolved from very different circumstances and in a very different way. First, . . . [t]he dissenters benefited, as they had in Vermont, from the frontier situation and tended, after 1740, to see New Hampshire as a haven from oppression and for new social and economic opportunities . . . . [B]y the end of the 1680's the Quakers were obtaining exemption from religious taxes, and the Anglicans and Presbyterians obtained it soon after. The Baptists found when they arrived in large numbers that their reception varied greatly from town to town . . . . [D]espite a frontier climate which encouraged egalitarianism and toleration, the dissenters were never sure what their status was in New Hampshire. Such freedom as the Baptists acquired was primarily the result of local town meeting decisions and not of legislative or constitutional guarantees or of judicial decisions.

Id.

539. *Id*. at 834. Concerning this Act, McLoughlin writes:

> In 1817–1819 it was to the pragmatic expediencies of party politics rather than to any triumph of principle that the dissenters owed their final victory over compulsory religious taxes. Even this occurred only after Connecticut had set the precedent in 1818. It was disestablishment in Connecticut, not in neighboring Vermont, which provided the catalytic stimulus to end the established system in New Hampshire.

Id. McLoughlin later discusses the effect of the Toleration Act of 1819 in these words:

taxes[540] but maintained the concept of New Hampshire being a Protestant commonwealth.[541]

> The Toleration Act put an end to a system of compulsory religious taxes by which a man could, against his will and his conscience, be forced to pay to support a minister whom he never heard and to maintain a church which he never joined and with which he did not want to be associated. It thus ended the certificate system and the responsibility placed on juries for deciding the honesty of a man's claims to be a member of a sect distinct from that of the majority in his town or parish. But the Toleration Act did not draw a clear line between church and state in New Hampshire. It implicitly, if not explicitly, maintained the conception that New Hampshire was a Christian—in fact a Protestant—commonwealth. It clearly acknowledged that the Protestant religion was so essential to the welfare of the civil state that in certain respects the state should encourage and support it.

Id. at 910. While foreign to modern thinking, this disposition allowed the populace to disestablish New Hampshire by means of the ballot box rather than by statute or judicial precedent. While the letter of the law still allowed for some level of establishment, the will of the people prevailed and the potential establishment was prevented from becoming reality.

540. KINNEY, *supra* note 529, at 107–08. Kinney provides the text of the relevant provisions as follows:

> Sec 2. And be it further enacted, That the tenth section of the Act [of Feb. 8, 1791], to which this is an amendment, be and the same is hereby repealed. Provided that towns between which and any settled minister there is prior to, or at the passing of this act a subsisting contract, shall have a right from time to time to vote, assess, collect and appropriate such sum or sums of money as may be necessary for the fulfillment of such contract and for repairing meeting-houses now owned by such town so far as may be necessary to render them useful for town purposes—Provided that no person shall be liable to taxation for the purpose of fulfilling any contract between any town and settled minister who shall prior to such assessment file with the town clerk of the town where he may reside a certificate declaring that he is not of the religious persuasion or opinion of the minister settled in such town.
>
> Sec 3d. And be it further enacted, that each religious sect or denomination of Christians in this State may associate and form societies, may admit members, may establish rules and by-laws for their regulation and government, and shall have all the corporate powers which may be necessary to assess and raise money by taxes upon the polls and rateable estate of the members of such associations, and to collect and appropriate the same for the purpose of building and repairing houses of public worship, and for the support of the ministry; and the assessors and collectors of such associations shall have the same powers in assessing and collecting, and shall be liable to the same penalties as similar town officers have and are liable to—Provided that no person shall be compelled to join or support, or be classed with, or associated to any congregation, church or religious society without his express consent first had and obtained—Provided also if any person shall choose to separate himself from such society or association to which he may belong, and shall leave a written notice thereof with the clerk of such society or association, he shall thereupon be no longer liable for any future expenses which may be incurred by said society or association—Provided also, that no association or society shall exercise the powers herein granted until it shall have assumed a name and stile by which such society may be known and distinguished in law, and shall have recorded the same in a book or records to be kept by the clerk of said Society, and shall have published the same in some newspaper in the County where such society may be formed if any

A religious test for public office was not repealed until 1876.[542] New Hampshire did not modify until 1968 the language in Article 6 of its bill of rights that elevated the Protestant faith.[543]

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be printed therein, and if not then in some paper published in some adjoining County.

Id. Reaction to the new law, as recorded by George Barstow, included the despair of Congregationalists. He writes:

> By the orthodox it was loaded with anathemas. The clergy feared that their tithes would be diminished when the people were no longer compelled to pay them. The ignorant and bigoted mourned over the change with well-meant sorrows. "Alack! Alack!" said they, "religion! we have none of it. Our general court at Concord have put away our religion. The godly folk there fought hard and long for religion, but the wicked ones outnumbered them, and religion is clean gone!" The clergy had instilled into the minds of the ignorant that the wicked ones (who composed the majority of the legislature) had destroyed a law without which religion could not exist.
>
> After the passage of the Toleration Act, a clamor was raised throughout the state, with the hope of producing a reaction against the bill and thus influencing the elections. Some declared it to be a "repeal of the Christian religion;" others said that "the Bible is abolished;" others that "the wicked bear rule." The truth perhaps was that the dominant sect could no longer support their system by extortion and oppression, that all sects were placed upon a level—so that it was not religion which was abolished, but the power of the Congregational order.

Id. at 108–09 (quoting GEORGE BARSTOW, THE HISTORY OF NEW HAMPSHIRE 1614–1819, at 440 (1842)).

541. As late as 1868, the state supreme court decided that a Unitarian minister would not be allowed to use the town meetinghouse because of his heterodoxy, and this in spite of being called and settled by a majority of the community. KINNEY, *supra* note 529, at 113–17. The case of *Hale v. Everett*, 53 N.H. 9 (1868), was summarized by Kinney as follows:

> Chief Justice Jonathan Everett Sargent, who presented the majority opinion in favor of Hale that [Rev.] Abbott should be deprived of his clerical charge, found it necessary to review the whole history of church-state relations in New Hampshire to find sufficient justification for the court's actions. In a long, involved, and often abstruse opinion, he rested much of the case on the "fact" that Abbott could not have been qualified to preach in the Dover parish church because he had himself stated that he was not a Christian.
>
> . . . .
>
> The clue to the court's decision is apparently found in the clause which states "does not profess any other religion or belong to any of the other religious divisions of men . . . ." Abbott had professed to believe something other than the usually accepted version of Christianity. Sargent continually referred to Abbott's renunciation of Christ as the Messiah and to the preacher's rejection of Christianity itself.

KINNEY, *supra* note 529, at 114–15 (quoting *Hale*, 53 N.H. at 10).

542. *Id*. at 137. Concerning the repeal of the religious test, Kinney reports:

> The second issue before the 1876 convention was the religious test. Unlike the previous question [concerning Article Six of the Bill of Rights], this stirred up little debate. The convention, at least, was in accord that New Hampshire had outlived the requirement that the state's elected officials should be professed Protestants. The

3. Maine

Although not one of the original thirteen states, Maine, much like Vermont, is a state with a rich colonial history.[544] Early in the seventeenth century, explorers from both England and France attempted to lodge permanent settlements in this fertile territory.[545] The efforts of the French left traces of Catholicism,[546] while the

> question put before the public was "Do you approve of abolishing the religious test as a qualification for office, as proposed in the amended Constitution?" Less than a thousand more citizens approved this proposal than approved the amendment to revise Article 6 of the Bill of Rights, but the number sufficed to change the Constitution. By a vote of 28,477 to 14,231 the amendment obtained its two-thirds majority and narrowly squeaked through. The odious religious test had finally been eliminated as a requirement for public office.

Id.

543. N.H. CONST. pt. 1, art. 6. The following language is the result of a 1968 amendment. The article now reads:

> As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.

Id.

544. *See* RONALD F. BANKS, MAINE BECOMES A STATE: THE MOVEMENT TO SEPARATE MAINE FROM MASSACHUSETTS 1785–1820, at 3–25 (1970). Banks explains that Maine's admission as the twenty-third state in 1820 was the result of forty years of agitation and activism by settlers under the yoke of Massachusetts. *Id.* Maine's history, however, starts long before its domination by the Massachusetts Bay Colony.

545. *See* HERBERT EDGAR HOLMES, THE MAKERS OF MAINE (1912). From the Viking explorations to the fall of the fortress at Louisberg, Nova Scotia, in 1758, Holmes traces Maine's history from a decidedly pro-Catholic perspective. Chapters 4 and 5 chronicle the initial French expeditions and the establishment of New France. Chapter 21 deals with the grant to Gorges by the British crown.

546. *See* WILLIAM LEO LUCEY, THE CATHOLIC CHURCH IN MAINE (1957). Lucey opens his first chapter with the following paragraph:

> Maine is the only New England state with a Catholic history rooted deep in the colonial period. Her forests, seacoasts and rivers from the St. Croix to the Saco are filled with memories of Franciscans, Capuchins, Jesuits, priests of the Foreign Missions, and priests of the diocese of Quebec, ministering to the spiritual needs of the Abenaki Indians and French traders and with reminders of the remarkable fidelity of Indians to the doctrines of Christianity taught them with great patience and many sacrifices by these missionaries. These memories were frequently recalled by David W. Bacon, the first Bishop of Portland, and the pioneer Catholics of Maine

patent granted to Sir Ferdinando Gorges by Charles II established (on paper at least) the Church of England.[547] The 1677 purchase of Maine by Massachusetts from the heirs of Gorges opened the territory to Congregationalism.[548] It was not until 1691, however, that a new charter issued by William and Mary made the ecclesiastical laws of Massachusetts binding in Maine.[549] There followed a migration of Congregationalists and dissenters to Maine, the former for land and opportunity and the latter seeking both prosperity and greater religious liberty.[550]

> as they faced the task of organizing a diocese, and they were heartened by them. The labors of these missionaries have not lost their power to inspire, and some of them are recalled in this chapter as a preface to the history of the diocese of Portland.

Id. at 1.

547. GRANT OF THE PROVINCE OF MAINE, 1639, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1625, 1626–27. Concerning the Anglican Church, the grant reads:

> And Wee Doe name ordeyne and appoynt that . . . All Patronages and Advowsons Free Disposicons and Donacons of all and every such Churches and Chappells as shalbee made and erected within the said Province and Premisses or any of them with full power lycense and authority to builde and erecte . . . there as to the said Sir Ferdinando Gorges his heires and assignes shall seeme meete and convenient and to dedicate and consecrate . . . according to the Ecclesiastical Lawes of this our Realme of England togeather with all and singuler and as large and ample Rights Jurisdiccons Priviledges Prerogatives Royalties Liberties Immunityes Franchises Preheminences and Hereditaments as well by Sea as by Lande within the said Province and Premisses and the Precincts and Coasts of the same or any of them and within the Seas belonging or adjacent to them or any of them as the Bishopp of Durham within the Bishopricke or Countie Palatine of Duresme in our Kingdome of England now hath useth or enjoyeth or of right hee ought to have use or enjoye within the said Countie Palantine as if the same were herein particulerly menconed and expressed.

Id.

548. After purchasing Maine in 1677, Massachusetts governed their newly acquired territory under the charter granted to Gorges. WILLIAM WILLIS, A HISTORY OF THE LAW, THE COURTS, AND THE LAWYERS OF MAINE 26–27, 35–36 (1863).

549. R.C. SIMMONS, THE AMERICAN COLONIES FROM SETTLEMENT TO INDEPENDENCE 110 (1976). Simmons writes, "The Crown formally incorporated Maine into Massachusetts in 1691 under the second Massachusetts charter." *Id.* It was this 1691 charter that also extended Massachusetts to include the former colony of Plymouth. For a discussion of the ramifications of this second charter on the political monopoly of the Puritans in New England, see *id.* at 106–09.

550. Baptists numbered only 183 in 1787 but had grown to 1600 strong by the year 1800. Similarly, Methodists grew from being completely absent in 1792 to the second-largest denomination in Maine with 6,000 members by 1820. BANKS, *supra* note 544, at 140. Concerning Scotch-Irish Presbyterianism, another author records:

> [T]he Presbyterian Scotch-Irish objected to rising tithes paid to an alien Anglican church, and ministers often encouraged members of their congregations to

Maine was thus a land of diverse religious influences[551] populated by rugged individualists less prone to entertain the abstract philosophizing of the governors to the south.[552] Competing religions and convictions concerning voluntaryism, as well as the independent spirit of the settlers, found their voice in Maine's 1819 constitution.[553] It took effect in 1820 after Congress authorized

emigrate. Between 1717 and 1776 perhaps some 150,000 Scotch-Irish left for America.

> The Scotch-Irish who left Ireland in 1717–1718 disembarked in Boston and sought land in New England; an initial welcome turned sour as Congregationalists came to resent and then oppose the establishment of their brand of Presbyterianism. At Worcester, Massachusetts, a mob destroyed a Presbyterian church. The Scotch-Irish then moved toward the frontier, particularly into New Hampshire, into the region that later became Vermont, and into Maine.

SIMMONS, *supra* note 549, at 183. Simmons later relates the following concerning Quakers:

> Maine, as a frontier, offered special attractions for Quaker missionaries and was extensively visited in the 1740s, when Samuel Fothergill wrote of the "people flocking into meetings in crowds" and behaving "with great solidity." A Congregational minister noted with alarm, at about the same time, that his church had to keep a day "of fasting and prayer on account of the spread of Quakerism." In the 1770s a second wave of Quaker expansionism took place in the new frontier of south-central Maine.

Id. at 209.

551. Relying on the sources already cited, it appears that the Church of England, the Congregationalist Standing Order, the Church of Scotland (Presbyterian), Quakers, Baptists, Methodists, and Roman Catholics were all represented in Maine.

552. *See* ALAN TAYLOR, LIBERTY MEN AND GREAT PROPRIETORS: THE REVOLUTIONARY SETTLEMENT OF THE MAINE FRONTIER, 1760–1820, at 11–30 (1990). Taylor writes the following concerning the temperament of the mid-Maine settlers:

> In mid-Maine, the agrarianism of the 1780s was seconded by the heritage of resistance rooted in the coastal towns established by Colonel Dunbar. Most of the backcountry's new settlers migrated from or through those towns, where they learned to challenge proprietary claims and justified violent resistence.
>
> . . . .
>
> . . . [T]he disgruntled yeomen who fled to mid-Maine could cling to their convictions that wilderness lands ought to be freely available to the needy and the common folk had the right to resist laws they perceived as unjust. Mid-Maine's settlers dubbed several new settlements on proprietary land Freetown, Freedom, Unity, New Canaan, and Liberty Mount to express their hope that they had obtained free land and to identify their new communities with the Revolution. In 1808, Fairfax's settlers remembered, "Many of us were soldiers in our revolutionary war, that we faithfully served our country in its struggles for freedom, that we lost our all in the momentous contest, that we fled to the wilderness as a refuge from poverty and oppression and that by our toils, industry and cares that wilderness now buds and blossoms like the rose."

Id. at 16–18.

553. ME. CONST. of 1819, *reprinted in* 3 CONSTITUTIONS, *supra* note 230, at 1646, 1646–49. Article I, Section 3 states:

Maine's admission as the twenty-third state.[554] The constitution did not establish any religion[555] while ensuring religious liberty for the state's diverse population.[556] Thus, the Congregational

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship;—and all persons demeaning themselves peaceably as good members of the State shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

Id. at 1647.

554. The quest for statehood injected Maine into the brewing controversy over slavery. Massachusetts granted Maine the right to secede from their state provided that Congress voted to admit them to the union before March 4, 1820. At this same time, Missouri was seeking admission into the union, but as a slave state. Maine was caught in the debates that would ultimately result in the Missouri Compromise and was approved for admission as a free state on March 3, 1820. *See* BANKS, *supra* note 544, at 184–204.

555. *See id*. at 154. Banks compares Maine to Massachusetts as follows:

> Article I of the Maine Constitution contained twenty-four sections devoted to a "Declaration of Rights." This article was patterned after Part I of the Massachusetts Constitution, which contained thirty-three provisions. Both were devoted to the enumeration of "inalienable rights" that were to be enjoyed by all citizens, but the Maine Constitution departed from its model in two important respects: (1) The Maine Constitution (sec. 4) guaranteed freedom of *speech* and *press*. The Massachusetts Constitution, to the regret of John Adams, its chief architect, guaranteed only the freedom of the press: (2) The Massachusetts Constitution (pt. I, art. 2, 3) established a "quasi-religious" commonwealth [whereas Maine did not].

Id.

556. *See id*. at 156. Banks writes:

> In the debate over what became Section 3 of Article I, no one contested the establishment of the principle of freedom of religion. The only disagreement came from those who thought that the omission of the phrase "duty to worship" was too permissive and would encourage some to seek freedom from religion. The convention, led by [John] Holmes, who declared that "to make it a *duty* to exercise a *right* is preposterous," defeated what Holmes described as an attempt to incorporate in the constitution "a whole body of ethics."
>
> There was no discussion at all on the floor of the convention of the delicate question of the status of Roman Catholics. The committee had received a memorial from James Kavanagh, Matthew Cottrill, and William Moony, leaders of one of the only two non-French and non-Indian Catholic communities in Maine centered around Damariscotta, begging the delegates to give Catholics equality with Protestants. Despite some backstage opposition to granting their prayer, especially

establishment, which had been the written law since 1691, albeit largely unenforced, ended with the constitution of March 1820.

E. Lyman Beecher: Converted Skeptic

To illustrate the powerful appeal of voluntaryism to the members of the many evolving Protestant sects, we look at the life of one more American, Lyman Beecher (1775–1863). Unlike James Burgh and Isaac Backus, respectively a Whiggish Unitarian and a Baptist dissenter, Beecher learned the value of voluntaryism only after losing the battle to secure his own church from disestablishment. Beecher was raised in the Congregational Church of Connecticut by an aunt and uncle. He entered Yale College at the age of eighteen.[557] After graduation he elected to continue divinity training under Dr. Timothy Dwight, who was by then the president of the school.[558] After two dismal pastoral placements, he had his first taste of success in Boston at the Hanover Street Church.[559] His eight years in Boston were marked with numeric success but also intense opposition. In spite of various low points along the way,[560] Beecher's ministry saw large numbers of converts joining his church.[561] In 1832, he moved west to Cincinnati and took the helm at Lane Seminary.[562] After eighteen years as president of the seminary, Beecher retired to the Ohio home of his son, Henry Ward Beecher.[563]

One of Beecher's greatest contributions was the antislavery drive he passed onto his children. Lyman Beecher's insatiable taste for causes such as temperance, abolition, and voluntaryism made an

> from William King, who harbored a deeply imbedded mistrust of "popish ambition," the convention would probably have given Catholics equality even if the memorial had not been presented.

Id.

557. LYMAN BEECHER, 1 THE AUTOBIOGRAPHY OF LYMAN BEECHER xii (Barbara M. Cross ed., Harvard University Press 1961) (1864).

558. 1 DICTIONARY OF AMERICAN BIOGRAPHY 135 (Dumas Malone ed., 1964).

559. 1 BEECHER, *supra* note 557, at xxvii–xxix.

560. In 1829, his church building was burned down. *Id*. at xxx. A series of sermons against Catholicism in 1831 contributed to vandalism at a convent in nearby Charlestown. 1 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 558, at 136.

561. 1 BEECHER, *supra* note 557, at xxviii–xxix ("[I]n the first four years of Beecher's pastorate 133 men and 233 women joined his church.").

562. *Id*. at xxx.

563. 1 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 558, at 136.

indelible impression on the next generation of Beechers.[564] *Uncle Tom's Cabin* (1851) was written by his daughter, Harriet Beecher Stowe. As part of the abolitionist effort, "Beecher's Bibles" (crates of rifles) were shipped to the Kansas territory by Henry Ward Beecher, one of Lyman's sons.[565] Even Beecher's "autobiography" was a collective effort involving the aged Beecher and several of his children.[566]

Throughout Beecher's career, he never wavered from his main objectives. He was preoccupied with individual holiness: he believed wholeheartedly that the republic would collapse should the virtue of the populous wane, and he had utmost confidence that the Protestant religion was the surest means to the civic morality requisite to sustain the republic.

What makes Beecher so interesting for our purposes is his change of heart concerning the best means of supporting religion so as to sustain the republic. As a member of Connecticut's Standing Order, he fought against disestablishment out of a conviction that it would be the ruination of both the state and the church.[567] In his

564. 1 BEECHER, *supra* note 557, at xi–xiv. Cross paints Beecher as a father in less than flattering colors. His children all rejected the theological orthodoxy of their father, several suffered from chronic emotional ailments, and two committed suicide. However, she says, "If the spiritual economy was costly, it was also productive, nor did the nervous disabilities that threatened the Beechers interrupt their determined service." *Id.* at xiii. She goes on to write, "The energy Beecher kindled among American Protestants burned brightest in his own family." *Id.* at xiv. For more about the family, see generally MILTON RUGOFF, THE BEECHERS: AN AMERICAN FAMILY IN THE NINETEENTH CENTURY (1981).

565. RUGOFF, *supra* note 564, at 381. Concerning Henry's "Bibles," Rugoff writes:

> Master of gestures, Henry now asked his congregation to send Sharps rifles to New Englanders on their way to join the Free-Soil settlers in Kansas. Rifles, he cried, are "a greater moral agency than the Bible." The weapons were shipped in boxes marked "Bibles" and soon all rifles sent to Free-Soilers were called "Beecher's Bibles."

Id.

566. 1 BEECHER, *supra* note 557, at xi. Barbara Cross says of this work:

> [T]he *Autobiography* was written by a characteristic Beecher maneuver—the father reminiscing, while six of his eleven living children took notes, collected letters, and called upon their own childhood memories. By 1864, one year after his father's death, Charles Beecher had arranged and selected the sermons, letters, recollections, and court records that reflect at once the sweep of an epoch and the tortuous drama of the Puritan conscience.

Id.

567. RUGOFF, *supra* note 564, at 290. For a good example of Beecher's attitude toward religious pluralism in the wake of the 1818 Connecticut constitution, see Lyman Beecher, *The Toleration Dream*, *in* 1 BEECHER, *supra* note 557, at 290–300, a biting essay about the forces demanding toleration.

autobiography, he recalls his reaction to the news that the 1818 constitution of Connecticut had been ratified and thus the church disestablished. In Beecher's words:

> It was a time of great depression and suffering. It was the worst attack I ever met in my life, except that which Wilson made. I worked as hard as mortal man could, and at the same time preached for revivals with all my might, and with success, till at last, what with domestic afflictions and all, my health and spirits began to fail. It was as dark a day as ever I saw. The odium thrown upon the ministry was inconceivable. The injury done to the cause of Christ, as we then supposed, was irreparable. For several days I suffered what no tongue can tell *for the best thing that ever happened to the State of Connecticut*. It cut churches loose from dependence on state support. It threw them wholly on their own resources and on God.[568]

Beecher was destined to throw his considerable energy into supporting voluntaryism as adamantly as he had opposed it.

The unchanging foundation of Beecher's zeal is best demonstrated by comparing the similarities of his writings before and after disestablishment in Connecticut. The discussion here will contrast a sermon delivered in 1803 and a tract published in 1835. *The Practicability of Suppressing Vice* is a sermon delivered by Beecher in 1803 and shows his support for the government in maintaining and promoting religion.[569] *A Plea for the West* is an 1835 essay by Beecher as the president of Lane Seminary in Cincinnati urging churches in New England to contribute toward the building of a chapel at the seminary.[570] Each work is concerned with the virtue and personal holiness of citizens, but the means of accomplishing this desired end are in stark contrast.

Beecher begins his 1803 sermon by recounting how vice destroys civil government.[571] In building a case for forming voluntary agencies

568. 1 BEECHER, *supra* note 557, at 252–53; *see also* 2 *id.* at 336–37.

569. LYMAN BEECHER, THE PRACTICABILITY OF SUPPRESSING VICE, BY MEANS OF SOCIETIES INSTITUTED FOR THAT PURPOSE (1804).

570. LYMAN BEECHER, A PLEA FOR THE WEST (1835).

571. BEECHER, *supra* note 569, at 4. Beecher argues this point from history:

> The history of individuals, of families, societies and nations, is a melancholy confirmation of this remark. Egypt, Tyre, Babylon, Rome and Carthage, though dead, still speak, in impressive language the power of sin. They fell before it: and so uniform and irresistable hitherto, has been its influence, that it has become a maxim, that nations through the influence of moral causes, have their infancy, middle age,

to battle vice, he highlights the essentiality of a cooperative effort to control it.[572] He refutes the distinction between immorality and irreligion. While admitting that they are denotatively different, Beecher proposes that they are inseparably linked by cause and effect.[573] Irreligion allows the individual to escape the jurisdiction of the "government of God,"[574] which can only lead to increased immorality. Beecher then transitions into explaining his support for an established church. He views the preservation of institutional religion as a duty.[575] He also suggests that voluntary agencies formed to suppress vice will only be effective if they are auxiliary to the efforts of the state.[576]

Throughout the sermon Beecher's unwavering objective is the virtue of individual citizens; no mention is made of the purity of the church. His understanding of the link between public morals and the maintenance of public order are straightforward, but his assumption that religious institutions juridically allied with the state are the

old age and death; that no nation will ever be exempted, but every one in melancholy succession, sink to the house appointed for all the living.

Id.

572. *Id*. at 5–10.

573. *Id*. at 17. Beecher writes:

> Before we proceed, it may be proper to notice a popular distinction, craftily made between immorality and irreligion. The one is acknowledged to affect the security both of life and property, while the other is supposed to injure no one but the subject. That irreligion is not, in its influence, so direct and immediate, may be readily granted. But is it therefore harmless? Is it not rather a certain and most fruitful cause of immorality?

Id.

574. *Id*. Beecher worries that if immorality persists even where the church is supported and active, "to what height would they have arisen, had the fear of God, and the expectation of future punishment, been obliterated." *Id*.

575. *Id*. Beecher proposes:

> Nor can the practicability and propriety of suppressing irreligion, be questioned; for, although it is not the province of man to make christians, and dictate creeds, it is his province, and the laws have made it his duty, to preserve those institutions of heaven, by which a sense of moral obligation, and the expectation of reward and punishment is kept alive.

Id. at 18.

576. *Id*. at 19. In Beecher's words:

> When it is intimated that associations for the suppression of vice, may be the only effectual method to preserve our liberties, it is not supposed that moral societies alone can effect this: they are to be considered rather as an addition to existing means, and calculated to impart to them additional efficacy.

Id.

solution, and not part of the problem, provides the basis for his early and earnest support of the Standing Order in Connecticut.

As recounted above, Beecher witnessed the "downfall of the standing order" with a sense of defeat and depression. He viewed the event as the beginning of the end for the "cause of Christ." "For several days I suffered what no tongue can tell,"[577] over what he later came to believe was a good thing. When he changed his view on disestablishment, he attributed the reversal to the fact that religion's influence on the state increased when freed of state support.[578] Newfound was his appreciation for voluntaryism as the means of best promoting civic virtue.

In *A Plea for the West*, Beecher returns to his lifelong focus on individual holiness and its necessity to the preservation of civil liberties. What most distinguishes this essay from his 1803 sermon is its focus on the voluntary principle in religious concernments as the means for attaining a virtuous citizenry. Beecher begins by singing the praises of the West,[579] and proposes that this new land will retain its greatness only by means of a sustained and settled religious influence. Beecher believes that education is most effective when administered under the watchful eye of religion.[580] Therefore, the building of seminaries, as well as church-sponsored schools and colleges, is the best means of ensuring the long-term success of the West.[581]

577. 1 BEECHER, *supra* note 557, at 252.

578. *Id*. at 252–54.

579. *See* BEECHER, *supra* note 570, at 14.

580. *Id*. at 24. Beecher proposes:

> Experience has evinced, that schools and popular education, in their best estate, go not far beyond the suburbs of the city of God. All attempts to legislate prosperous colleges and schools into being without the intervening influence of religious education and moral principle, and habits of intellectual culture which spring up in alliance with evangelical institutions, have failed. Schools wane, invariably, in those towns where the evangelical ministry is neglected, and the Sabbath profaned, and the tavern supplants the worship of God. Thrift and knowledge in such places go out, while vice and irreligion come in.

Id. at 23–24.

581. *Id*. at 37–38. Beecher challenges his New England audience with their own experience:

> But we know what to do: the means are obvious, and well tried, and certain. The sun and the rain of heaven are not more sure to call forth a bounteous vegetation, than Bibles, and Sabbaths, and schools, and seminaries, are to diffuse intellectual light and warmth for the bounteous fruits of righteousness and peace. The corn and

The urgency of Beecher's plea is prompted by a battle line just forming. Massive emigration from mostly Catholic countries was raising alarms from the dominant Protestantism in the fledgling United States. After America survived a grueling fight to disestablish churches in the original colonies, Beecher expressed concern that the Catholic Church would reverse this advance by establishing the Roman Church in the vacancy recently created by Protestants.[582] Beecher is careful to point out that his concern is not with Catholicism as a religion, but rather as a political force tending to authoritarianism.[583] He welcomes the immigrants and their native faith if they come to join in the American experiment with human liberty.[584] His warning to his fellow Americans concerns the influence of the foreign-born, foreign-educated clergy assigned by the papacy, a foreign power.[585]

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the acorn of the East are not more sure to vegetate at the West than the institutions which have blessed the East are to bless the West.

Id.

582. *Id*. at 56–57. Beecher warns:

> But if, upon examination, it should appear that three-fourths of the foreign emigrants whose accumulating tide is rolling in upon us, are, through the medium of their religion and priesthood, as entirely accessible to the control of the potentates of Europe as if they were an army of soldiers, enlisted and officered, and spreading over the land; then, indeed, should we have just occasion to apprehend danger to our liberties. It would be the union of church and state in the midst of us.

Id.

583. *Id*. at 63–64. In Beecher's words: "But before I proceed, to prevent misapprehension, I would say that I have no fear of the Catholics, considered simply as a religious denomination, and unallied to the church and state establishments of the European governments hostile to republican institutions." *Id*. at 63. He returns to the point:

> It is to the political claims and character of the Catholic religion, and its church and state alliance with the political and ecclesiastical governments of Europe hostile to liberty, and the tendency upon our republican institutions of flooding the nation suddenly with emigrants of this description, on whom for many years European influence may be exerted with such ease, and certainty, and power, that we call the attention of the people of this nation.

Id. at 69.

584. *Id*. Beecher continues:

> Let the Catholics mingle with us as Americans . . . and the various powers of assimilation, and we are prepared cheerfully to abide the consequences. If in these circumstances the Protestant religion cannot stand before the Catholic, let it go down, and we will sound no alarm, and ask no aid, and make no complaint. It is no ecclesiastical quarrel to which we would call the attention of the American nation.

Id. at 63–64.

585. *Id*. at 57–59. Beecher argues:

Putting aside his fear of Catholicism, what is remarkable in Beecher's essay is the means by which he proposed to preserve the West. He prioritizes education, especially religiously sponsored education, as a means to enlightening the masses.[586] Contrary to his earlier opinions, he vilifies any "union of church and state" as being a great wrecker of republics, for it brings civil and religious strife.[587] That is not all of the damage done, argues Beecher, for the union of church and state also harms the institutional church and corrupts its clergy:

> It is a union of church and state, which we fear, and to prevent which we lift up our voice: a union which never existed without corrupting the church and enslaving the people, by making the ministry independent of them and dependent on the state, and to a great extent a sinecure aristocracy of indolence and secular ambition, auxiliary to the throne and inimical to liberty.[588]

Beecher envisioned independent churches as an organizing force that multiplied the morality and virtue of individual believers. However, it is not always clear whether Beecher viewed the object of religion instrumentally either as sustaining civil liberties and

> Her priesthood educated under the despotic governments of Catholic Europe, and dependent for their office, support and honors upon a foreign temporal prince, on whose sanction to their laws and doings they are as dependent as the colonies were upon George the Third . . . a priesthood not elected by their people, or dependent on them during good behavior, or accountable to them for their deeds, but dependent on a foreign jurisdiction, and to a great extent on foreign patronage. This would, indeed, be a church and state union—another nation within the nation—the Greek in the midst of Troy.

Id.

586. *Id.* at 31–32. Beecher pleads with his readers:

> We must educate! We must educate! or we must perish by our own prosperity. If we do not, short from the cradle to the grave will be our race. If in our haste to be rich and mighty, we outrun our literary and religious institutions, they will never overtake us; or only come up after the battle of liberty is fought and lost, as spoils to grace the victory, and as resources of inexorable despotism for the perpetuity of our bondage.

Id.

587. *Id.* at 82. For example, Beecher writes of religious divisiveness in public life:

> The Lord deliver us from the alliance of any church with the state; for it will be the alliance of ambition with ambition, of corruption with corruption, of despotism with despotism, and of a persecuting irreligion with a persecuting Christianity. It will produce a reaction, should the alliance ever take place; but the conflict will be dreadful, and blood will flow.

Id.

588. *Id.* at 78–79.

republican government or as saving individuals from sin. Having this criticism of Beecher in mind, historian Barbara Cross recounts a passage from a keen observer of the early republic: "Remarking that the American ministry tended to justify religion for its civic utility, [Alexis] de Tocqueville wondered whether the priest in America would be lost in the politician."[589] Beecher was clear, however, that the moral influence of the church over civil government must be accomplished indirectly through the mediation of believers who are also citizens. A free church inspires believers toward moral attitudes and behaviors, while these same believers, in their role as citizens, in turn keep government virtuous through their informed voting and other civic and political activity.

Lyman Beecher's legacy as a pastor and educator is a study in frenetic activity and idealistic vision, but as a reformer he enjoyed only limited success. His efforts toward legislating temperance would ultimately wax and wane in the early twentieth century. His passion for the abolition of slavery would be resolved not by Christian persuasion, but by fighting the bloodiest war in American history. His reversal on establishment and the adoption of voluntaryism, however, signaled great gains for American church-state relations, as well as voluntaryism's ultimate embrace by Roman Catholicism (an object of Beecher's concern) as recent as the 1965 Second Vatican Council.

F. The Settlement as Seen by Historians

The more careful estimates are that by 1830 evangelical Christians comprised forty percent of the nation's population.[590] That percentage may not overwhelm, but its importance is by way of comparison. In the early national period no other system of thought, school, party, media outlet, or other institution came close to

589. 1 BEECHER, *supra* note 557, at xxii–xxiii. Cross continues: "To hearers, Beecher's sermons seemed primarily political orations. But Beecher felt no necessary tension between the secular and the divine. For the way of the Lord was being prepared by the 'march of civil and religious liberty,' by trade routes, geography, the press, and colleges." *Id.* at xxiii.

590. NOLL, *supra* note 33, at 197 ("The absolute numbers are impressive: even if Robert Baird's contemporary assertions identifying 70% or 80% of Americans as adherents of evangelical churches was much inflated, more conservative estimates still leave, as in Richard Carwardine's conclusion for the mid-1850s, 'over 10 million Americans, or about 40 percent of the total population . . . in close sympathy with evangelical Christianity.'"). Noll relies on estimates of active attendance from actual membership found in RICHARD J. CARWARDINE, EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA 43–44 (1993).

defining the American character. Through ordinary persons, ministered to on a weekly basis, these class-leveling, nonformalist churches had become a major (albeit indirect and unofficial) mover and shaper of American public life.[591] Religion could not be ignored. While the population of the United States increased by fourfold in the first half of the nineteenth century, church attendance increased by tenfold. By way of example, at mid-century "the Methodists became the largest religious body in the United States and the most extensive national organization other than the Federal government."[592] Because these growing churches were unwaveringly committed to voluntaryism, they were a major causative force behind (and full partners in) disestablishment and the forming of the American church-state settlement.

The surge in Protestant expansion, later termed the Second Great Awakening, was marked not only by two new methodologies, but also by one from the past. New was the formation of denominations with national scope and determined mobilization as well as the formation of voluntary religious societies. Carried forward from the past was the revival, albeit its occasional camp-meeting venue was new.[593]

With the creation of a central government to unite the former colonies, the ecclesiastical bodies devised new societies of churches, which would give them a means of expression commensurate with the continental responsibilities of the new national government. That innovation, which came to be called denominationalism, was the formation of organized "bod[ies] with the limitation[] of a sect, but the [global] self-consciousness of the Church Universal."[594]

591. *Id.* at 195–202, 208.

592. WIGGER, *supra* note 35, at 11.

593. *Id.* at 182.

594. WILLIAM ADAMS BROWN, CHURCH AND STATE IN CONTEMPORARY AMERICA 104 (1936); James H. Smylie, *Protestant Clergy, the First Amendment and Beginnings of a Constitutional Debate, 1781–91*, *in* THE RELIGION OF THE REPUBLIC 116, 141–50 (Elwyn A. Smith ed., 1971). For example, the Methodists formed themselves into a denomination of episcopal governance in 1784. In 1788, the Presbyterians united into a national organization calling itself the General Assembly of the Presbyterian Church in the U.S.A. A year later the Episcopalian Church organized nationally while remaining in loose affiliation with the Church of England. The Dutch Reformed and other religious societies followed, with most of the organizations of churches forming national denominations or, in the case of the antihierarchical Baptists, conventions of churches, by the early nineteenth century. These denominational structures enabled the training of pastors and their placement as vacancies occurred, sharing of financial resources, coordination of activities, and agreement on best

One drawback of denominational structures was that they could get in the way of interdenominational cooperation. That potentiality was averted by the formation of many new voluntary societies or parachurch agencies. These societies worked alongside churches while making no claim to be a church. Typically these voluntary societies formed nonprofit corporations and were led by church laity. They were charitable and mission organizations dedicated to working on specific social ills or specific mission objectives. By focusing on desired outcomes or objectives, the voluntary societies did not get sidetracked by doctrinal differences among the denominations. This quality also helped in fundraising, a task in which denominational loyalties can be an impediment to donor giving. These voluntary societies, while now commonplace to Americans, struck Alexis de Tocqueville (visiting in the early 1830s) as warranting his readers' special attention:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fêtes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form as association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.[595]

The voluntary societies of national scale numbered perhaps as many as 200, examples of which are the American Board of Commissioners for Foreign Missions (1810), American Bible Society (1816), the American Education Society (1816), each having

strategies. Roman Catholics also sought to organize by creating a bishopric in America. This step created a bit of amusing confusion when church officials in Rome sought approval from the U.S. Congress to organize itself in America. To their surprise, Roman officials were informed that no approval was necessary. *See* 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 477–82 (1950).

595. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer & Max Lerner eds., Harper & Row 1969) (1851). *See generally id.* at 513–17.

primarily religious objectives,[596] and many having in mind social ills such as slavery or meeting the needs of the poor. Moral reformation also gained considerable attention, with these voluntary societies addressing everything from outlawing dueling to promoting temperance to extending suffrage to women. By 1834 the total monetary giving to these benevolent societies was equal to the entire budget of the federal government.

This surge of religious evangelicalism, because it subscribed to voluntaryism as a matter of religious principle, had a profound impact on religious freedom. On the eve of the American Revolution there was everywhere in the colonies a general spirit of increasing liberality toward religious exercise, particularity toward dissenting Protestants. There remained, of course, vestiges of establishmentarianism and a deep suspicion of Roman Catholics. Only one of the thirteen states under the Articles of Confederation afforded equal rights to all non-Protestants with respect to the practice of religion.[597]

With this new burst of religious energy in the early national period, and in large measure because of the manner in which these growing Protestant churches conceived their place in general society, the defeat of religious assessments and then the repeal of religious tests for holding public office were achieved in state after state. Although not the first to identify it, Sidney Mead is the popularizer of the observation that disestablishment was a common cause and common triumph of certain well-placed statesmen with Lockean sympathies (most prominently James Madison),[598] joined with the more numerous but less highly positioned Protestant enthusiasts.[599] The alliance was of limited reach, of course, for the two allies in this

596. NOLL, *supra* note 33, at 182–83, 197–98.

597. EDWIN S. GAUSTAD, NEITHER KING NOR PRELATE: RELIGION AND THE NEW NATION, 1776–1826, at 24–25 (rev. ed. 1993). In Rhode Island, equal rights for all non-Protestants were recognized from its founding. *Id*. at 19, 24–25. However, even in Rhode Island, Catholics and Jews faced limits on holding public office. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 90–91 (1986).

598. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430–35 (1990) (discussing Locke's work and his influence on American founders).

599. *See* MEAD, *supra* note 73, at 38–39, 42–43, 45, 52–53. Mead calls the two parties in common cause "rationalists" or "deists," on the one hand, and "pietists," "sectarians," or "left-wing Protestants," on the other hand.

cause sought the same outcome (namely disestablishment) but did so for very different reasons. Specifically, the Protestant dissenters sought to protect their religion from government regulation whereas the rationalists sought to remove sectarian strife from the precincts of civil government. After achieving disestablishment the two parties to the alliance soon parted ways.[600]

The foregoing history of the adoption of the American church-state settlement is supported by historians from a wide range of periods and ideological positions. From the famed Alexis de Tocqueville to the contemporaries Robert Baird and Philip Schaff, in the annals of diplomat and historian George Bancroft, and continuing into the twentieth century in the works of the venerable William Warren Sweet and modernist Jack Rakove, a consistent picture of a new approach for a new republic is inescapable. It is especially telling that nineteenth century historians recorded with confidence the church-state settlement of the new American republic. Being far removed from the church-state battles pending before the twenty-first century Supreme Court, they cannot be accused of writing with an eye to today's culture war.

1. Alexis de Tocqueville

The oft-quoted passage that follows is de Tocqueville capturing the sense of religion and government he observed in the America of the 1830s:

> Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions . . . . I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.
>
> . . . .
>
> The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other . . . .

600. *Id.* at 42–43. *See also* JOHN M. MECKLIN, THE STORY OF AMERICAN DISSENT 36 (1934).

. . . .

> On my arrival in the United States the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country. My desire to discover the causes of this phenomenon increased from day to day. In order to satisfy it I questioned the members of all the different sects . . . . I found that [Catholic clergy] . . . all attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.[601]

Lesser-known historians also saw this unique American symbiosis of state and religion, thus corroborating de Tocqueville's analysis.

2. Robert Baird

Starting in 1835 and continuing for eighteen years, Robert Baird, cleric turned social commentator, served as a missionary agent to Europe, traversing the continent and investing much time and energy in promoting the Protestant gospel there.[602] When discussing American religion with Europeans, the subject of establishment versus voluntaryism was a frequent question for this evangelical ambassador. As a result of his frequent lectures and writings on the subject, Baird compiled *Religion in America*, printed in Geneva in 1842, in Scotland in 1843, in the United States in 1844, and reprinted in a second edition in 1856.[603] Henry Warden Bowden, editor of an abridged version of Baird's work, has proposed that Baird and Philip Schaff (discussed below) stood alone during the mid-nineteenth century in their comprehensive understanding of

601. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305–06, 308 (Francis Bowen & Phillips Bradley eds., Knopf 1945) (1851).

602. ROBERT BAIRD, RELIGION IN AMERICA: A CRITICAL ABRIDGEMENT xi–xii (Henry Warner Bowden ed., 1970) (1856).

603. *Id.* at xii.

"the whole range of religious activity in the United States."[604] Baird's perspective is one of a patriot and Protestant extolling the virtues of the American settlement to Europeans, while Schaff is a foreign national reporting his observations of American religion to his German countrymen.

Baird approaches his discussion systematically so as to dispel European misconceptions and lay down a reliable record. Concerning disestablishment, he begins by pointing out that the American settlement was a process worked out in the states as opposed to an act of the national government, giving 1833 as the date for final and complete disestablishment.[605] He summarizes a European belief that Thomas Jefferson was the catalyst for disestablishment in America and then demonstrates that the real impetus is to be found in the evangelical camp.[606] Baird is sanguine

604. *Id*. at xiii.

605. BAIRD, *supra* note 90, at 227. In Baird's words:

> [M]any persons in Europe seem to be under the impression that the union of church and state was annihilated at the Revolution, or, at all events, ceased upon the organi[z]ation of the State governments being completed. This, however, was not so in all cases. The connection between the civil power, and all the States in which Episcopacy had been established in the colonial period, was dissolved very soon after the Revolution by acts of their respective legislatures. But the Congregational Church in New England continued to be united with the state, and to be supported by it long after the Revolution. Indeed, it was not until 1833 that the last tie that bound the church to the State in Massachusetts was severed.

Id.

606. *Id*. at 230–45. Baird writes:

> A very general impression prevails in England, and perhaps elsewhere, that the entire separation of church and state in America was the work of Mr. Jefferson, the third [P]resident of the United States . . . . Still, it was not Jefferson that induced the State of Virginia to pass the [A]ct of [S]eparation. That must be ascribed to the petitions and other efforts of the Presbyterians and Baptists . . . .
>
> . . . .
>
> This early discussion of the propriety of dissolving the union of church and state in Virginia, after the [R]evolutionary [W]ar had broken out, had some effect, probably, on other States placed in similar circumstances . . . .
>
> . . . .
>
> I have elsewhere spoken of the accumulated evils which grew out of the connection between the church and the state in Massachusetts. Those evils became so great that the friends of evangelical religion, in other words, of the orthodox faith of every name, resolved to unite in urging an amendment of the constitution of the State, by which some better results might be obtained. Their efforts were crowned with success. The amendment having been voted by the legislature in three successive sessions, 1831–33, became part of the organic law of the State, and the union of church and state was brought to a close.

Id.

about the short-term negative effects of disestablishment on some denominations[607] but concludes that all Americans agree on the long-term benefit to both church and state that was then already evident.[608]

Book IV of Baird's work is dedicated to the voluntary principle as found in the American settlement.[609] He outlines four phases in the evolution from an intolerant established church to full religious freedom as experienced in the United States.[610] Baird attributes American voluntaryism to the "character and habits" of the American people.[611] He outlines efforts by Protestant denominations,

607. *Id*. at 245–53. Baird primarily relates the devastating effect that disestablishment, in combination with the War of Independence, had upon the Anglican Church in America, but also reported recent statistics that indicated growth and a new-found health within the Episcopal Church.

608. *Id*. at 251–52. Baird reports:

> [I]n no part of the United States was the proposal to disestablish the church received with more serious apprehension than in New England . . . . But it ought to be known that not a single survivor at this day, of all who once wrote against the separation of church and state in Connecticut, has not long since seen that he was mistaken, and has not now found to be a blessing what he once regarded as a calamity . . . . Twenty-five years have now elapsed since that time, and although I have been much in Connecticut during the last fifteen years, know many of the clergy, and have conversed much with them on the subject, out of the 200 or 300 once established ministers of that State, I am not aware of there being more than one Congregational minister in the State who would like to see the union of church and state restored in it . . . . On no one point, I am confident, are the evangelical clergy of the United States, of all churches, more fully agreed than in holding that an union of church and state would prove one of the greatest calamities that could be inflicted on us, whatever it might prove in other countries.

Id.

609. *Id*. at 286–411.

610. *Id*. at 287. According to Baird:

> But it was not long before a step in advance was made by Virginia and Massachusetts, of all the colonies the most rigid in their views of the requirements of a church establishment. Private meetings of dissenters for the enjoyment of their own modes of worship began to be tolerated.
>
> A second step was to grant to such dissenters express permission to hold public meetings for worship, without releasing them, however, from their share of the taxes to support the established church.
>
> The third step which religious freedom made, consisted in relieving dissenters from the established church—from the burden of contributing in any way to its support.
>
> And finally, the fourth and great step was to abolish altogether the support of any church by the state, and place all of every name on the same footing before the law, leaving each church to support itself by its own proper exertions.

Id.

611. *Id*. at 290–92. Baird explains the foundation of the American settlement as follows:

by means of the voluntary principle, to expand their numbers within the United States.[612] Baird then summarizes the effects of voluntaryism on education from primary schools to universities and seminaries.[613] He also explains how the American settlement has engendered and shaped social-service ministries throughout the country, such as the temperance movement[614] and relief for the poor and needy.[615]

3. Philip Schaff

In 1843, Dr. Philip Schaff, a Swiss-born German theologian, was hired as a professor of historical and exegetical theology in a fledgling German Reformed seminary located in Pennsylvania.[616] Schaff recorded his experience with American religion at various times during his decade living in the United States and documented the unique perspective of a European theologian on the distinctive church-state relationship that he found. While obviously unimpressed early in his tenure, Dr. Schaff would report a much

> Thus have the Americans been trained to exercise the same energy, self-reliance, and enterprise in the cause of religion which they exhibit in other affairs . . . .
>
> Besides, there has grown up among the truly American part of the population a feeling that religion is necessary even to the temporal well-being of society, so that many contribute to its promotion, though not themselves members of any of the churches . . . .
>
> The people feel that they can help themselves, and that it is at once a duty and a privilege to do so.

Id. at 292.

612. *Id*. at 310–26. The following chapters appear in Book IV: chapter seven, "The Voluntary Principle Developed in Home Missions—American Home Missionary Society"; chapter eight, "Presbyterian Board of Domestic Missions, Under the Direction of the General Assembly"; chapter nine, "Home Missions of the Episcopal, Baptist, and Reformed Dutch Churches, and American and Foreign Christian Union"; and chapter ten, "Home Missions of the Methodist Episcopal Church." *Id*.

613. *Id*. at 326–71. Book IV includes: chapter eleven, "The Voluntary Principle Developed—Influence of the Voluntary Principle on Education—Of Primary Schools"; chapter thirteen, "Colleges and Universities"; chapter fourteen, "Sunday Schools—American Sunday-School Union and other Sunday-School Societies"; chapter seventeen, "Education Societies"; and chapter eighteen, "Theological Seminaries." *Id*.

614. *Id*. at 388–92. Book IV, chapter twenty-three is entitled "Of the Influence of the Voluntary Principle in Reforming Existing Evils—Temperance Societies." *Id*.

615. *Id*. at 398–401. Book IV, chapter twenty-six is entitled "Influence of the Voluntary Principle on the Beneficent Institutions of the Country." *Id*.

616. PHILIP SCHAFF, AMERICA: A SKETCH OF ITS POLITICAL, SOCIAL, AND RELIGIOUS CHARACTER ix–x (Perry Miller ed., 1961) (1855).

more favorable opinion upon further experience with America's unique arrangement of church and government.

In a work published in 1845,[617] Schaff analyzed church-state relations in the United States from the perspective of a theologian. He complains of the "poisonous plant of sectarianism" which he claims is most hardy in "England, and her now full grown, emancipated daughter America."[618] He accuses both British and American churches of quibbling over church polity even when there was agreement on more important issues of doctrine.[619] He acknowledges, although with obvious scorn, the argument that a free market in religious opinion stimulates rather than stifles religious conviction,[620] while demonstrating his discomfort with a system that more sharply divides the secular and the sacred.[621]

617. PHILIP SCHAFF, THE PRINCIPLE OF PROTESTANTISM (1845).

618. *Id.* at 107.

619. *Id.* at 111 ("In conformity with this character, the controversies belonging to the history of the English and North American Churches, turn not so much on doctrine, as on the constitution and forms of the Church.").

620. *Id.* at 117–18. Schaff writes with apparent skepticism:

> I am well aware, that many respectable Christians satisfy their minds on the subject of sectism, by looking at it as the natural fruit of evangelical liberty. In the main matter, the leading orthodox protestant parties, they tell us, Episcopalian, Presbyterian, Methodist, Lutheran and Reformed, are all one; their differences have respect almost altogether to government and worship only, that is to the outward conformation of the Church, in the case of which the Lord has allowed large freedom; and so far as they may have a doctrinal character, they may be said to regard not so much the substance of the truth itself, as the theological form simply under which it is apprehended. The separation of these Churches, in the mean time, is attended, we are told, with this great advantage, that it serves to stimulate their zeal and activity, and to extend in this way the interest of religion.

Id.

621. *Id.* at 136. In a harsh caricature, Schaff explains his view of American Protestantism:

> The idea seems to be, that a man's piety is deposited in one corner of his spirit, his politics in another, and his learning in a third. All good and necessary in their place, but having nothing whatever to do with one another! According to this view, it might seem to be expected farther that religion should never come into any closer union with the common secular departments of life. It must be counted pernicious, if the Church should be drawn into nearer contact with the State, or art be made more extensively subservient to divine worship, if Christian morality should seek to occupy all social relations, or Christian theology presume to incorporate with itself the results of worldly science, philosophy in particular.

Id.

By 1854, however, Schaff presents a very different picture in two lectures delivered in Prussia.[622] According to Schaff, "the principle of religious freedom rests [in America] on a *religious* basis."[623] Contrary to his previously hostile position, Schaff praises the zeal and productivity of American religion and commends it as an example for Europe.[624] He addresses the accusation that the lack of a religious establishment encourages apostasy by comparing American faith with European unbelief and skepticism.[625] Schaff admits his theoretical preference for a unified church while praising the undeniable results of the American solution when he writes:

622. SCHAFF, *supra* note 616, at 3 ("The present work has grown out of two discourses, which I delivered, by request during a visit to the capital of Prussia, on the 20th and 30th of March 1854 . . . .").

623. *Id.* at 91. This statement in context is as follows:

> From the above allusions to American church history it is at the same time clear, that the principle of religious freedom rests there on a *religious* basis, as the result of many sufferings and persecutions for the sake of faith and conscience; and thus differs very materially from some modern theories of toleration, which run out into sheer religious indifference and unbelief. The American is as intolerant as he is tolerant; and, to appreciate his character, we must keep this paradoxical fact always in view. In many things he is even decidedly fanatical. Think only of the Puritanic origin of New England, and of the enormous influence which the strict Calvinism still exerts on the whole land . . . . The American leaves every man at liberty to belong to any church, confession, or sect, or to none, according to his own free conviction. But within the particular confessions the lines are far more sharply and strictly drawn than in Europe. There every church member is required to adhere closely to the doctrines and usages of the particular body, to which he belongs.

Id. at 91–92.

624. *Id.* at 94. In Schaff's words:

> In the ecclesiastical condition of America, with all the differences among particular branches, these general characteristics are all clearly defined. The religious life of that country is uncommonly practical, energetic, and enterprising. Congregations, synods, and conventions display an unusual amount of oratorical power, and of talent for organization and government; and it is amazing, what a mass of churches, seminaries, benevolent institutions, religious unions and societies, are there founded and supported by mere voluntary contribution. In all these respects, Germany and the whole continent of Europe, where the spirit of church building and general religious progress does not keep pace at all with the rapid increase of population in large cities, could learn very much from America.

Id.

625. *Id.* at 98–99. Schaff writes:

> The charge that the sect system necessarily plays into the hands of infidelity on one side and of Romanism on the other has hitherto at least not proved true, though such a result is very naturally suggested. There is in America far less open unbelief and skepticism, than in Europe; and Romanism is extremely unpopular.

Id.

> We would by no means vindicate this separation of church and state as the perfect and final relation between the two. The kingdom of Christ is to penetrate and transform like leaven, all the relations of individual and national life. We much prefer this separation, however, to the territorial system and a police guardianship of the church . . . and we regard it as adapted to the present wants of America, and favorable to her religious interests . . . . It is not an annihilation of one factor, but only an amicable separation of the two in their spheres of outward operation; and thus equally the church's declaration of independence towards the state, and an emancipation of the state from bondage to a particular confession. . . . [U]nder such circumstances, Christianity, as the free expression of personal conviction and of the national character, has even greater power over the mind, than when enjoined by civil laws and upheld by police regulations.[626]

Thus, Schaff, a eurocentric theologian, became a convert to the American settlement after a decade of experience with the impressive results of untethering the church from the state.

4. George Bancroft

The son of a New England clergyman, George Bancroft established himself early as a budding intellect. Entering Harvard College in 1813 at the age of thirteen, Bancroft thereafter earned both a Master of Arts and a Doctor of Philosophy from the University of Göttingen in Germany.[627] Upon his return to the United States, Bancroft demonstrated his lack of aptitude as a clergyman and teacher[628] before taking up his more memorable vocation as a politician with a Fourth of July speech delivered in Springfield, Massachusetts, in 1826.[629] Bancroft wrote much, including Andrew Johnson's "first annual message as President in

626. *Id*. at 75–76.

627. Mark A. DeWolfe Howe, *George Bancroft*, *in* 1 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 558, at 564. While studying in Europe, Bancroft was tutored under the likes of Schleiermacher and Hegel in Berlin, visited Goethe in Weimar, and met Lafayette and Gallatin in Paris, as well as Napoleon's sister, Princess Pauline Borghese, and Lord Byron in Italy. *Id*.

628. *Id*. at 565.

629. *Id*. ("Uttered on the day of Jefferson's death, it was animated with the spirit of his political principles as well as with those of the fiftieth anniversary of July 4, 1776. It was the deliverance of a convinced democrat, and so set the note for much of Bancroft's subsequent writing.").

December 1865."[630] However, he is best known for his ten-volume *History of the United States*, which he wrote and revised between 1834 and 1885.[631] *History* is marked by the perspective of an advocate extolling the virtues of his beloved democracy,[632] a fact that has drawn criticism while simultaneously providing the modern reader with a glimpse of public sentiments during Bancroft's life and times.[633]

In a separate, two-volume work, *History of the Formation of the Constitution of the United States of America*, Bancroft began his coverage of the American church-state settlement, unsurprisingly, with James Madison and the Virginia experience. He notes that while the Church of England was firmly entrenched in that state, the population was shifting in the years leading up to the Revolution such that the citizenry was predominantly dissenting whereas the political leadership remained primarily Anglican churchmen.[634] In explaining the supposed need in 1784 of a general assessment for the maintenance of religion and hence public morals, Bancroft points

630. *Id*. at 568. According to Howe,

> Bancroft's identification with an enterprise so unpopular in New England as the Mexican War, and such circumstances as his appearance as the official eulogist of Andrew Jackson soon after his death in June 1845, contributed to the disfavor in which he was held in the dominant circles of Massachusetts—the same circles which looked askance at a later appointee to a cabinet portfolio as one having "merely a national reputation."

Id. at 567.

631. *Id*. at 566, 567, 568–69.

632. *Id*. at 569 ("He wrote with the strong bias of an ardent believer in democratic government."). This weakness as a historian was not due to ignorance of his obvious preferences. Howe quotes Bancroft's brother-in-law, John Davis, as warning, after the publication of the very first volume of his *History*, "'Let me entreat you not to let the partisan creep into the work. Do not imbue it with any present feeling or sentiment of the moment which may give impulse to your mind.'" *Id*. at 566 (citation omitted).

633. *Id*. Howe quotes the *Harvard Graduates' Magazine* as saying, "[Bancroft's] position as Father of American History is as unshaken as that of Herodotus among the Greeks," to which he quickly adds, "He produced an 'epic of liberty' faithful to the spirit of his time." *Id*. at 569.

634. 1 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 212 (Fred B. Rothman & Co. 1983) (1882). In Bancroft's words:

> The inherent perverseness of a religious establishment, of which a king residing in another part of the world and enforcing hostile political interests was the head, showed itself in Virginia. The majority of the legislators were still churchmen; but gradually a decided majority of the people had become dissenters, of whom the foremost were Baptists and Presbyterians.

Id.

out that it was the established church that was in decline in Virginia amid a variety of vibrant and growing dissenting sects.[635] Educated at Princeton, where he was taught theology by Witherspoon, Madison emerged as the prominent progressive in the fight against taxation for the support of religion. As Bancroft recounts the conflict:

> [T]he opponents of the measure were led by Madison, whom Witherspoon had imbued with theological lore. The assessment bill, he said, exceeds the functions of civil authority. The question has been stated as if it were, is religion necessary? The true question is, are establishments necessary for religion? And the answer is, they corrupt religion. The difficulty of providing for the support of religion is the result of the war, to be remedied by voluntary association for religious purposes. In the event of a statute for the support of the Christian religion, are the courts of law to decide what is Christianity? and, as a consequence, to decide what is orthodoxy and what is heresy? The enforced support of the Christian religion dishonors Christianity.[636]

Bancroft notes that both Baptists and Presbyterians worked in concert with Madison in opposing Patrick Henry's assessment bill, each denomination sending important petitions to the General Assembly.[637] The devastating effects of the Revolution on the Anglican Church in the United States began to recede only after the American dioceses incorporated under the banner of the Protestant Episcopal Church, all with the approval of and loose alliance with the

635. *Id*. at 213. Bancroft's account states:

> Churchmen began to fear the enfeeblement of religion from its want of compulsory support and from the excesses of fanaticism among dissenters. These last had made their way, not only without aid from the state, but under the burden of supporting a church which was not their own. The church which had leaned on the state was alone in a decline.

Id.

636. *Id*. at 214.

637. *Id*. at 215–16. Concerning Baptist and Presbyterian involvement, Bancroft writes:

> The general committee of the Baptists unanimously appointed a delegate to remonstrate with the general assembly against the assessment; and they resolved that no human laws ought to be established for that purpose; that every free person ought to be free in matters of religion. The general convention of the Presbyterian church prayed the legislature expressly that [Jefferson's] bill concerning religious freedom might be passed into a law as the best safeguard then attainable for their religious rights.

Id.

mother church in England.[638] This new Anglican ecclesiology was, according to Bancroft, quite different and the result of changing attitudes toward church-state relations.[639]

Changes in church-state concernments were not limited to Episcopalians. Bancroft reports that the English founder of Methodism, John Wesley, directed the formation and administration of the Methodist Episcopal Church in the former colonies. Wesley believed that the new country which had won its political independence should also be free to conduct its religious affairs independent of oversight from across the sea.[640] The Catholic

638. *Id*. at 217–18. Bancroft reports the activities of the Protestant Episcopal Church as follows:

> During the colonial period the Anglican establishment was feared, because its head was an external temporal power engaged in the suppression of colonial liberties, and was favored by the officers of that power even to the disregard of justice. National independence and religious freedom dispelled the last remnant of jealousy. The American branch at first thought it possible to perfect their organization by themselves; but they soon preferred as their starting-point a final fraternal act of the church of England . . . . Their wish having been fulfilled in the form to which all of them gave assent and which many of them regarded as indispensable, the Protestant Episcopal church of the United States moved onward with a life of its own to the position which it could never have gained but by independence.

Id.

639. *Id*. at 218. Bancroft continues:

> For America no bishop was to be chosen at the dictation of a temporal power to electors under the penalty of high treason for disobedience; no advowson of church livings could be tolerated; no room was left for simony; no tenure of a ministry as a life estate was endured where a sufficient reason required a change; the laity was not represented by the highest officer of state and the legislature, but stood for itself; no alteration of prayer, or creed, or government could be introduced by the temporal chief, or by that chief of the legislature. The rule of the church proceeded from its own living power representing all its members. The Protestant Episcopal congregations in the several United States of America, including the clergy of Connecticut who at first went a way of their own, soon fell into the custom of meeting in convention as one church, and gave a new bond to union. Since the year 1785, they have never asked of any American government a share in any general assessment, and have grown into greatness by self-reliance.

Id.

640. *Id*. at 219–21. Bancroft quotes from a 1784 letter of Wesley's addressed to Thomas Coke, Francis Asbury, and the Methodists in America when he writes:

> In America there are no bishops who have a legal jurisdiction. Here, therefore, my scruples [concerning separation from the Church of England] are at an end. I have accordingly appointed Dr. Coke and Mr. Francis Asbury to be joint superintendents over our brethren in North America. I cannot see a more rational and scriptural way of feeding and guiding those poor sheep in the wilderness. As our American brethren are now totally disentangled both from the state and from the English

Church was also disoriented by the new church-state sentiments in America. Bancroft records that Rome was momentarily perplexed in 1786 when it requested permission from the Confederation Congress to set up an American bishopric, and Congress responded by completely disavowing federal jurisdiction over matters of organized religion.[641]

The experiences of the foregoing historians are especially valuable for the context and times in which they wrote. Spanning most of the nineteenth century, none of these authors was ever exposed to the concept of applying provisions of the Bill of Rights to the states, or of federal judicial power resolving local questions of church and government. Their perspective on the American settlement was focused exclusively on the popular sentiments of the people who brought about disestablishment state by state. This veil of innocence has not been completely unnoticed by more modern scholars, however. Both William Warren Sweet and Jack Rakove paint historical pictures compatible with these earlier observers.

5. William Warren Sweet

"The name of William Warren Sweet has become practically synonymous with American Church history," writes one of Professor Sweet's students and colleagues, Sidney Mead.[642] Sweet, while important for the sheer volume of his works, is all the more significant for his scholarly agenda. In 1927, having been called to the American Church History chair at the Divinity School of the University of Chicago, Sweet made it his goal "to remind secular

> hierarchy, we dare not entangle them again either with the one or the other. They are now at full liberty simply to follow the Scriptures and the primitive church, and we judge it best that they should stand fast in that liberty wherewith God has so strangely made them free.

Id. at 220–21.

641. *Id*. at 225. In the midst of anti-French sentiment among the Jesuits and pro-French attitudes among American patriots, most notably Benjamin Franklin, the Vatican cautiously contemplated an American bishopric. Bancroft reports:

> The Roman see proceeded with caution; and a letter from its nuncio at Paris, on the appointment of a bishop in the United States, was communicated to congress. In May, 1786, they, in reply, expressed a readiness to testify respect to the sovereign and the state represented by the nuncio, but, disavowing jurisdiction over a purely spiritual subject, referred him to the several states individually.

Id.

642. Sidney E. Mead, *Prof. Sweet's Religion and Culture in America: A Review Article*, 22 J. CHURCH HISTORY 33 (1953).

historians of the religious factors that have helped to shape America; and to remind denominational and other historians of religion of the significance of other religious groups and the secular forces in shaping their particular groups."[643] Thus Sweet sought to view American history as one story that included both religious and secular chapters. This perspective allows the contemporary reader to look at the American church-state settlement from a vantage point that more closely approximates the truth than either a strictly secular or religious approach.

Sweet attempts to support a general thesis in his works that views the frontier as the forge of American religion.[644] This lens eventually forces Sweet to define "frontier" conceptually rather than geographically,[645] making colonial America a frontier for European religious malcontents and fortune seekers and the vast territory west of the Alleghenies the frontier for the New Republic. The role of religion in these two frontiers received its venture capital from a Great Awakening: first, in the English colonies under the likes of George Whitefield, Jonathan Edwards, Theodore J. Frelinghuysen, and the offspring (both physical and spiritual) of William Tennent;[646]

643. *Id*. at 33. The reason for this particular emphasis is apparent in Mead's later statement:

> When Professor Sweet began his work at the University of Chicago, American religious history as such was almost non-existent as a field of historical endeavor, and in graduate schools was generally frowned upon and discouraged. His work has contributed no small part to the effecting of the important change in this respect that has taken place.

Id. at 34.

644. *Id*. at 36. Mead frames the thesis stating, "[T]he great western frontier posed many new and peculiar problems which made it the 'testing ground,' so that those churches which developed and used techniques most effectively to meet the situation became numerically largest and most evenly distributed geographically, and hence 'most influential….'" *Id*.

645. *Id*. at 41. Mead continues his critical remarks:

> Lastly, the adequacy of the frontier thesis for the interpretation of the history of America since the decade 1870–1880 has long been subject to serious question. Professor Sweet and other "Turnerites" have been apt when dealing with this recent period to shift from a geographical to a sociological definition of "frontier," so as to include all culturally uprooted peoples for whatever reasons (e.g., the immigrants and other denizens of the new industrial urban centers) within the scope of the thesis. This shift of definitions is of course legitimate and perhaps points the way to a broader, more inclusive, and even more profitable "frontier thesis."

Id.

646. WILLIAM WARREN SWEET, REVIVALISM IN AMERICA: ITS ORIGIN, GROWTH AND DECLINE 22–43 (1944). These pages are the chapter entitled "Colonial Revivalism and the Growth of Democracy." Sweet devotes a separate chapter to the Dutch revival and one to the

later, in the wild lands of Kentucky and led by "new light" Presbyterians, Baptists, and circuit riding Methodists.[647] The Great Awakenings (Sweet links the two Awakenings as if they are nearly one) embraced a modified Calvinism and proclaimed a gospel of personal and emotional conversion as opposed to the cold orthodoxy which inspired few Americans.[648] Both revival movements struck a chord of individualism which resonated readily with Americans great and small.[649] This was, however, an individualism with an understood self-restraint.[650]

While unaffected spiritually by the first revival, the liberal elite in colonial America readily embraced its individualist message and allied themselves with its political implications. Mead, Sweet's student, twice uses the following quote in his book *The Lively Experiment*:

New England revival as well as a chapter to individuals involved in spreading revival throughout the colonies.

647. *Id*. at 112–39. This chapter is entitled "Revivalism and the Westward March."

648. *Id*. at 26–34. Sweet surveys the field as follows:

> [Frelinghuysen] stressed experimental rather than formal religion and advocated an emotional and individualistic approach rather than the intellectual. . . .
>
> . . . .
>
> . . . In the book which is the most self-revealing of all his books, and his first great theological treatise, *Religious Affectations*, Jonathan Edwards sets forth the overwhelming importance of the emotions in religion . . . .
>
> . . . .
>
> To use Bishop McConnell's words, Whitefield was always valiantly and eloquently "on the side of the more genuine humanity."

Id.

649. *Id*. at xii. Sweet posits in his preface:

> A society in motion is always an individualistic society . . . . A religion therefore which was to make an appeal to an individualistic society must make its chief concern the problems and needs of the common man; it must emphasize the fact that salvation is to a large degree a personal matter; that it is dependent upon individual decisions. Revivalism flourished because its appeal was to individuals; in a real sense it may be characterized as an Americanization of Christianity, for in it Christianity was shaped to meet America's needs.

Id.

650. Mead makes the point:

> It is important to emphasize in passing that for neither the rationalists nor the pietists was acceptance of the principle of free, uncoerced, individual consent an acceptance of guidance through individual whimsey. They did not surrender to the kind of individualism that sets the individual over against the community in an antagonistic relationship, because they envisaged the individual's consent as first to the authorities and laws necessary for stability and order in the community. For both the rationalists and the pietists, the individual became free only as he consented to necessary authority, discipline, and responsibility.

MEAD, *supra* note 73, at 62.

> [It was] the leadership of such Lock[e]an disciples as Jefferson and Madison, backed by an overwhelmingly left-wing Protestant public opinion, that was responsible for writing the clauses guaranteeing religious freedom into the new state constitutions and finally into the fundamental law of the land.[651]

The writings of John Locke, and a host of outspoken English Whigs like James Burgh, convinced such eminent figures as Thomas Jefferson, James Madison, George Mason, and others among the political elite in Virginia, that the authority of government emanated upward from the people rather than downward from God.[652] They applied this same theory to church governance, placing the ultimate determination of spiritual truth in the jurisdiction of the individual believer rather than a magisterial church.[653] Sweet makes an important observation concerning the lineage of an idea:

> Voltaire's views on religion also found wide acceptance among America's colonial liberals, and their opposition to religious superstition came to be quite that of Voltaire. Madison was familiar with the Voltaire position and often quoted Voltaire's aphorism: "If one religion were allowed in England, the government would possibly become arbitrary; if there were two, the people would cut each other's throats; but as there are a multitude they all live happy and in peace." To this Madison added, "security for civil rights must be the same as that for religious rights; it consists in the one

651. *Id*. at 43, 62 (quoting William Warren Sweet, *The Protestant Churches*, *in* 256 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 45 (1948)).

652. William Warren Sweet, *Natural Religion and Religious Liberty in America*, *in* 25 J. RELIGION 46 (1945). Sweet informs the reader that Locke wrote his *Two Treatises of Government* in 1690 in order to justify the deposition of James II and the "Glorious Revolution" of 1688. This required discarding the concept of the divine right of kings and replacing it with a theory more useful to Parliament. But as Sweet points out, "he unwittingly furnished the principal arguments for American resistance to British authority two generations later." *Id*.

653. *Id*. at 46–49. The embryonic concept of popular sovereignty in Locke makes his definition of the church as a "voluntary society" more intelligible. Sweet explains, "Though acknowledging the right of a church to excommunicate members, that fact does not deprive the one excommunicated 'of those civil goods that he formerly possessed, and it has no right of jurisdiction over those who are not joined to it.'" *Id*. at 48. Thus, churches are voluntary in that members may join or withdraw at their leisure; but they retain their full measure of authority as it relates to those who are voluntarily joined to them.

> case in a multiplicity of interests and in the other in a multiplicity of sects."[654]

This suggests that the "Madisonian vision" of competing factions arose, at least in part, from his understanding of how religious liberty is achieved and not the other way around. Sweet's analysis of the alliance between liberals and Protestant dissenters is one dependent upon the disinterest of the liberals with respect to the correctness of religious doctrine.[655] Concerning the importance of this alliance, Sweet says plainly, "The intellectual liberals had their part to play in [the cause against establishments], but without the support of the common people its great achievement—the separation of church and state and complete religious liberty—would have been impossible."[656]

Being a church historian, Sweet invests considerable energy in tracing the efforts and results of dissenters throughout the period spanning the two Awakenings. He proposes, "The story of colonial revivalism is the story of the beginning of the Americanization of organized Christianity; of the gradual adoption of new and untried ways of meeting peculiar American needs."[657] Among the impoverished and the young in the Dutch Reformed population of New Jersey, Theodore J. Frelinghuysen would preach his version of pietism which would eventually cause "reverberations in every Dutch congregation in America" and reach "high tide" in 1726.[658] After

654. WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 338–39 (Cooper Square, 1965) (1942) (quoting THE FEDERALIST NO. 51 (James Madison)).

655. *Id.* at 336. According to Sweet:

> People are naturally more tolerant of those things toward which they have no strong loyalties. Many good people who have no definite Church attachment still believe in religion; they believe in all the Churches, but no one of them holds their especial loyalty. This was Jefferson's position and represents that of many others of his time and of ours. People of this type, believing in all the Churches, are unwilling to give to any one Church special privileges. Thus it may be inferred that this large body of unchurched people in colonial America constituted an important element in the growth of the spirit of religious liberty.

Id.

656. Sweet, *supra* note 652, at 55.

657. SWEET, *supra* note 646, at 24.

658. *Id.* at 26–28, 44–52. Sweet wishes to set the record straight concerning the source of revivalism in the colonies when he writes:

> It has been frequently stated that the great colonial revival, which swept over the colonies from New England to Georgia in the middle third of the eighteenth century, was the extension of the great evangelical revival in England, fathered by the Wesleys and Whitfield. That this is an erroneous statement is easily shown by the

this Dutch revival, the gospel of pietism would seek out Scotch-Irish settlements, another community friendly to Calvinist thinking.[659] William Tennent, a priest in the Episcopal Church of Ireland, immigrated to America in 1716, left the Episcopalians to join the Presbyterians, and, most importantly, established a school for aspiring clergymen at Neshaminy, Pennsylvania, in 1726.[660] This school, scornfully called the "Log College," provided a steady stream of "new light" Presbyterian ministers until its replacement by the College of New Jersey (Princeton) and served as a precursor to the American Presbyterian's fascination with higher education.[661]

Jonathan Edwards has become the figurehead of the New England revival amongst Congregationalists with his motto, "The heart of true religion is holy affection."[662] The revival started a chain of events in New England that resulted in theological controversy and took fifty years to resolve.[663] In the Middle and Southern

> mere fact that the pietistic revival among the Dutch Reformed people in New Jersey was at high tide (1726) twelve years before John Wesley had his heart-warming experience at Aldersgate, and, in that very year (1738) the revivalistic Presbyterians formed the New Brunswick Presbytery in order to give greater impetus to the revivals which were mounting higher and higher throughout that whole region.

Id. at 26.

659. *Id*. at 28 ("In the history of revivalism the outstanding individual revivalists have been Calvinistic: exactly contrary to what might have been expected.").

660. *Id*. at 29–30.

661. *Id; see also* SWEET, *supra* note 654, at 313 ("William Tennent's Log College was not only the mother of Princeton, but it was also the precursor of a succession of other Log Colleges . . . . Nowhere did revivalism and education go more consistently hand in hand than among the New Light Presbyterians.").

662. SWEET, *supra* note 646, at 30. Sweet continues, "[Edwards] contended that, 'Our people do not so much need to have their heads stored, as to have their hearts touched.'" *Id*.

663. SWEET, *supra* note 654, at 312–13. As Sweet tells the story:

> The controversy that refused to be healed, however, was that in New England Congregationalism. The reason was that here, though starting as a conflict over revivalistic methods, it soon developed into a battle between two diametrically opposite schools of Christian thought . . . . The Arminian position was taken very naturally by the extreme opponents of the revival and as their opposition waxed stronger and stronger their doctrinal views became increasingly anti-Calvinistic. The orthodox Calvinists were themselves divided over issues which came out of the revival . . . . The out-and-out Arminians or Liberals eventually became Unitarian and had their principal following in eastern Massachusetts, particularly in and about Boston; the Edwardians made almost a clean sweep of western Massachusetts and Connecticut; while those representing Old Calvinist views were a scattered remnant. Such was the theological situation in New England following the great revival and, as a consequence, Congregationalism was in a turmoil for more than a half century.

Id.

Colonies, revival was primarily the result of Presbyterian and Baptist efforts. The first phase of the southern revival, led by "Log College" Presbyterian preachers,[664] resulted in the formation of the Hanover Presbytery in Virginia[665] under the leadership of the Reverend Samuel Davies.[666] The Second Awakening, instigated primarily by Baptists and later Methodists, firmly entrenched a disestablishment sentiment in much of the common citizenry.[667] In concluding a chapter entitled "Revivalism and Democracy," Sweet writes:

> The revivalists placed stress on the doctrine that all men are equal in the sight of God. When this doctrine is preached to humble people, it inevitably develops self-respect and a desire to have a part in the management of their own affairs. The preachers of the Great Awakening sought to reach all classes of men; slaves as well as masters; poor as well as rich; ignorant as well as learned. They knew no social distinctions. To them all were on the same plane; all were sinners and in need of a Saviour, whose grace alone availed. Thus the revivals were a great leveling force in American colonial society; they sowed the basic seeds of democracy more widely than any other single influence. . . .

664. SWEET, *supra* note 646, at 35–36. Sweet writes:

> The southern awakenings were started by Presbyterians from the Middle Colonies. Some Log College evangelists, traveling in Virginia, came in contact with a religious movement that had been begun in Hanover County by some laymen meeting together to read religious books. Out of this came the Hanover or Virginia revival which, under the dynamic leadership of Samuel Davies—himself a graduate of Samuel Blair's Log College in Pennsylvania—became an increasingly important force in Virginia. The Hanover Presbytery, formed in 1755 with Davies as the first moderator, marks the beginning of the long line of southern Presbyteries, which came to be seed plots of frontier cultural influence of great significance.

Id.

665. The Hanover Presbytery is of particular interest for the memorial which they sent to the Virginia General Assembly urging that body to reject Patrick Henry's general assessment bill in favor of voluntaryism. For more on the Hanover Presbytery, see SWEET, *supra* note 654, at 295–96.

666. Davies would later become president of the College of New Jersey following the death of Jonathan Edwards. *Id.* at 301.

667. SWEET, *supra* note 646, at 37–39. A definite theme develops in Sweet's works concerning the Baptists. "Since the Baptists held as their *cardinal principle* the separation of Church and State and complete religious liberty." *Id.* at 38 (emphasis added). "[W]hen it became generally known that the Baptists held as one of their *principles* the separation of church and state many leading men came to favor them." WILLIAM WARREN SWEET, THE STORY OF RELIGION IN AMERICA 221 (1930) (emphasis added). "Since the Baptists held as their *first great principle* the complete separation of Church and State they could not recognize any right on the part of the civil authorities to regulate their activities." SWEET, *supra* note 654, at 305 (emphasis added).

. . . .

> Virginia could not have played her conspicuous part in the movement for the independence of America if there had not been present within her borders a large dissenting element, created by the revivals, favorable to the principles of the revolution. Not only was this true of Virginia but everywhere the revivalistic bodies which had been greatly increased by the revivals, took almost unanimously the side of the party demanding all the rights of free men.[668]

Thus in Sweet's estimation the American populace had been moved by their religious views toward their political views, from a biblical revolution to a political revolution in the ordering of church and state.

Sweet's greatest contribution to the current discussion is his overlaying of secular and sacred history. He points out that an atmosphere of revolution in both the political and the religious spheres was brewing even as the colonies were being founded.[669] Sweet then notes the affirming effect of geographical isolation on radical ideas in both spheres.[670] Once the momentum of popular

668. SWEET, *supra* note 646, at 41–43.

669. SWEET, THE STORY OF RELIGION IN AMERICA, *supra* note 667, at 2.

> A revolution in politics and religion was in progress at the very time American colonization was under way. The old political faith as well as the old ecclesiastical establishments were under attack from every quarter; the parliamentary party not only opposed the divine right of kings; they likewise contested the divine right of bishops. "Not only were many of the first American colonists dissenters from the established religion, leaving the English shores just as the old political faith was being insistently questioned, but they were in a large majority poor men, dissatisfied with the existing order and easily lured by radical ideas."

Id.

670. *Id.* at 4.

> In the new world there were few restraining forces. If they had remained in Europe, their radical tendencies would doubtless have been somewhat held in check by tradition, by the presence of high church and civil officials; indeed, conservative forces and influences would have been all about them; but three thousand miles away across the Atlantic—then a much greater barrier than today—these restraining forces were not present, "and men moved forward rapidly, even recklessly, on the path of . . . experiment." All classes in America felt this liberation from the restraint of long established institutions, social, political and religious. Throughout the entire colonial period there was no church official of high rank in America, not an Anglican or Catholic bishop, or any other ecclesiastical official who might have exercised a restraining influence. By the time of the Revolution the people of America possessed a larger degree of freedom in religion than was to be found among any other

support was mustered by the banner-bearers in both circles[671] (liberal/rationalists and Protestant dissenters), independence from both England and church establishment was simply a matter of time. Sweet summarizes his approach as follows:

> [O]ur religious development cannot be understood apart from the economic, social and political changes. In other words, the same set of influences has produced similar results in both church and state, and each has exercised a constant influence on the other. The parallels between American political and religious history are both numerous and striking. "The complete separation of church and state in America, and our division into numerous denominations, should not blind us to the fact that there is after all a certain unity in American church history, as well as frequent connection between it and the civil history of the nation."[672]

6. Jack Rakove

In a chapter examining the larger relationship between religion, education, and civil society, Stanford University history professor Jack Rakove analyzes the thought of Thomas Jefferson and James Madison with respect to disestablishment.[673] In that essay, Rakove advocates a strict separation of church and state based on the writings of the "Sage of Monticello" and the "Father of the Constitution."[674] An interesting feature of the chapter is the use of

> people. They had carried on the freest debate on all religious questions without regard to bishops, priests, councils or creeds; thus encouraging an individualism in religion such as existed nowhere else.

Id.

671. *Id.* at 8. As for the leaders among the revivalists, Sweet writes, "The Great Awakening was the first religious movement which made any serious impression upon the common people of the American colonies, and marks the beginning of an aggressive American Christianity." *Id.*

672. *Id.* at 8–9.

673. Rakove, *supra* note 25, at 233–62.

674. *Id.* at 11. The editors describe Rakove's essay as follows:

> Jack Rakove begins with a historical perspective, asking how the Framers of the United States Constitution envisioned the relation between religion, education, and civic life; and he provides an interpretation of how their vision informs, shapes, and limits the relation among these spheres in a contemporary context. Rakove gives careful consideration to the influential contributions of Thomas Jefferson and James Madison. Recognizing the difficulty of applying eighteenth-century thinking to the changed circumstances of the twenty-first, Rakove argues that the Founders left us

economics as an analogy for understanding the First Amendment's Religion Clauses: free exercise of religion becomes the privatization of religious practice, while the no-establishment restraint becomes state deregulation of organized religion.[675]

Rakove begins his argument by examining what the Americans of the Revolution and early national period would have considered "civil society." Colonial America and the new republic were highly decentralized[676] and thoroughly religious.[677] This combination of factors guaranteed that the concept of civil society during this period was developed at the local level and was saturated with the prevailing religious preference of the community in question.[678] Rakove points out that the transition from a moderated monarchy to a self-governing republic required an increased commitment to an "informed public"[679] and effective safeguards against the dangers of

> with a uniquely American understanding of civic life that prescribes a rather strict separation between church and state.

Id. The other three works in this volume on religion are: Jean Bethke Elshtain, *Civil Society, Religion, and the Formation of Citizens*; Charles L. Glenn, *Religion and Education: American Exceptionalism?*; and Alan Wolfe, *Schooling and Religious Pluralism*.

675. Rakove, *supra* note 25, at 254–55.

676. *Id*. at 238. Rakove writes:

> But the American colonists had good reasons not to think too seriously about the nature of civil society. They lived, after all, in a culture in which political power was highly decentralized, where most of the rules that ordered daily life were adopted and adapted by town meetings, county courts, and juries that evidently played a far more active role in governance than their latter-day counterparts.

Id.

677. *Id*. at 237 ("In the eighteenth century . . . the sphere of religion might well have qualified as the most important element in whatever latent conception of civil society existed.").

678. *Id*. at 238 ("Where power was decentralized in this way, where not even a glimmer of bureaucracy existed, law tended to follow customary practice and community consensus, and thus to be responsive to values, attitudes, and habits formed within the locus of civil society.").

679. *Id*. at 240–41. In Rakove's words:

> The American decision for independence added a further dimension to the concept of the informed citizen . . . . Republican governments, it was well known, rested on the virtue of their citizens: their public-spiritedness, their willingness to subordinate private interest to public good, their capacity to monitor their rulers for signs of tyrannical ambition, their knowledge of the essential rights government existed to protect. A republican government required a republican society . . . . Americans had to be made into republican citizens, citizenship required education, and education might require a mix of old and new institutions and practices . . . . [I]t also meant that formal institutions of education—not only colleges, but schools as well—should acquire duties beyond the preparation of a ministry qualified to preach Scripture and a laity qualified to read it.

Id.

"factions." Factions had been the ruin of previous attempts at republican governance.[680] It was in this context that Jefferson and Madison joined forces with Protestant dissenters in an effort to settle the "religious question."[681]

Rakove then takes up the disestablishment achievement by first acknowledging its unfolding within the context of a Protestant ethos. He concedes that the political elites alone could not have carried off the feat without the religious dissenters and apart from a new way of thinking about religion that was ushered in by the surge of evangelical growth in the early republic:

> Intrigued as we may be by the culture of refinement and consumption, the sociability of the coffeehouse and tavern, or the ideal of an informed citizenry, it is difficult to deny the primacy of religion as the most salient aspect of American civil society. In part this is because "the contagion of liberty" that the Revolution released made the relation between church and state more problematic than it had been previously, reinforcing the pressures for disestablishment arising from sectarian dissenters with the liberal political ideas associated with Jefferson and Madison. . . . And perhaps most important, an emphasis on the primacy of religion is deserved because we also know how this challenge was eventually met and mastered. In the decades following the Revolution, the process that Nathan Hatch has called "the democratization of American Christianity" quickly gathered force, in turn generating what Jon Butler has described as "the antebellum spiritual hothouse." Old denominations were being reformed; new sects, even new creeds, were being invented;

680. *Id.* at 253. As Rakove records it:

> Here it was Madison, I think, who better grasped the unique implications and consequences that the commitment to disestablishment would have for the constitution of American civil society. In part, this was because he predicted his general solution to the overarching problem of "curing the mischief of faction" on the empirical evidence that the existing multiplicity of sects had already promoted the general security of religious liberty that he now hoped to advance in an even more principled and consistent way. As the classic formulation of *Federalist 51* asserts: "In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects." Such diversity (within reasonable limits) would prevent any one faction or narrowly drawn coalition from dominating government, using its power to impose policies inimical to the just rights and interests of the minority.

Id.

681. *Id.* at 243–44.

> everywhere there was deep spiritual ferment and competition for believers . . . . Evangelicals who had previously been regarded as disruptive pests in many sectors of southern society were now gaining converts and adherents by the tens of thousands; Methodism was being transformed from a small scale dissenting movement into its dominant position as the largest and most dynamic of America's proliferating and prolific Protestant denominations.[682]

The first step that was taken in solving the "religious problem," writes Rakove, was to move each new state's laws from toleration to individual free exercise.[683] In 1776, Madison landed an early blow in Virginia when his proposed amendment to George Mason's Declaration of Rights was accepted in part,[684] effectively moving that critical state from merely tolerating dissenters to granting equal rights to all persons with respect to the exercise of religion.[685] The more difficult and "radical" step involved convincing states that the only acceptable relationship between church and government involved doing away with religious establishment, even one inclusive enough to embrace all Protestant denominations.[686] The

682. *Id*. (internal citations omitted).

683. *Id*. at 246 ("The distinction between toleration and free exercise marks a first step in defining the relation between the religion question and the problem of civil society, especially when we consider its significance for a general theory of constitutional rights.").

684. The complete story of the development of religious freedom in Virginia from 1776 to 1787 is told in BUCKLEY, *supra* note 245; *see also* Daniel L. Driesbach, *George Mason's Pursuit of Religious Liberty in Revolutionary Virginia*, 108 VA. MAG. HIST. & BIOGRAPHY 5 (2000).

685. Rakove, *supra* note 25, at 246 ("Madison, the younger man, had the opportunity to act first when, as a delegate to the provincial convention in the spring of 1776, he gained approval for his amendment to the Virginia Declaration of Rights, broadening its promise 'that all men should enjoy the fullest toleration' to a more expansive recognition 'that all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience.'").

686. *Id*. at 248–49. According to Rakove:

> To pursue a thorough, root-and-branch policy of disestablishment thus marked the first instantiation of the principle that the creation of a limited government might involve something more than the pursuit of balance and accountability. Disestablishment involved identifying an entire realm of behavior that could be safely removed from the jurisdiction of government. Nor was this a trivial concession or limitation. For any sensible observer, reflecting on the troubled history of post-Reformation Europe, would have to conclude that the state could not prudently or completely abjure its responsibility and authority to police religious matters, or even to use religious institutions as an extension of state policies. That, after all, was also part of the Lockean logic that recognized the limits of the state's power to monitor

conventional wisdom of civic republicans was that the existence of healthy religious institutions was essential to the health of the state, and that the existence of healthy religious institutions depended on the support and protection of the state. Rakove notes Madison's belief that state establishment of religion had exactly the opposite effect. Contrariwise, the desired positive result could be obtained only by government leaving religion "to its own disputatious devices," thereby yielding a net benefit to both church and state.[687] Religion, specifically the institutional church, would have greater freedom and thereby vitality, and the state greater stability when free of creedal factions.

Rakove likens Madison to Milton Friedman: an opponent of the regulation of the religious enterprise and a proponent of the privatization of religious belief and practice.[688] Completing his analogy, Rakove points out that disestablishment brought healthy competition to the marketplace for souls while at the same time decreasing "transactions costs that would otherwise arise if dissatisfied truth seekers had to struggle against official

> without renouncing the idea that some beliefs need not be tolerated. To say that government could simply get out of the religion business, making both matters of belief and membership in particular religious communities completely voluntary decisions, thus marked a radical step in converting the general principle of limited government into a significant reduction of the domain in which government could operate. An entire, vital realm of behavior could, in effect, be removed from the agenda of public regulation, left free to operate entirely in private, under the control not of the state but of the autonomous choices of free-thinking individuals.

Id.

687. *Id.* at 250. Rakove unfolds the argument:

> It is true . . . that Madison believed that the vitality of religion could act as an essential source of the social pluralism required to provide a republican cure for the "mischief of faction." Indeed, Madison was more optimistic about the capacity of free-thinking Christians (and members of other faiths) to fruitfully multiply their doctrinal differences than he was about the comparable likelihood that the course of economic development would produce similar degrees of liberty-enhancing diversity. Yet Madison also understood that religion would produce these beneficent effects simply by being left to its own disputatious devices, as the faithful disagreed about the best road to salvation, the meaning of the sacraments, the proper organization of a church, and other arcane questions. And it was this understanding that sustained his confidence that the withdrawal of all public support for religion would redound to the advantage of church and state alike.

Id.

688. *Id.* at 254–55. "Privatization" is used here as if by an economist, namely, an enterprise not owned or operated by government. It is not a confining of religious practice and moral teaching to the home and church.

monopolies."[689] Rakove closes this part of his essay by arguing that the "greatest contribution" of the two famous Virginians to the nascent concept of civil society was to shift the competition in religious ideas to nongovernmental market forces.[690]

These six historians wrote in different times and had different theses, but for purposes here their essential conclusions are the same. Surging Protestantism in the national period changed America and was changed by it. This revolution in religion fed directly into the pursuit of individual liberty in general, and disestablishment in particular. This change was countered by the forces of civic republicanism, arguing that a self-governing republic was not possible without civic virtue, which was not possible without religion, which was safely nurtured only by an established religion. But this "old school" thinking was overcome by the combined forces of free-church Protestants and well-placed political elites of rationalist sympathies (especially James Madison). The triumph of this alliance, however, did not come during the period of colonial America. Nor did it come as a result of the First Amendment, or any other provision of the national Constitution for that matter. Rather, success was achieved, state by state, in the South following the start

689. *Id*. at 254. Rakove's analogy reads as follows:

> On the religion question, Madison was a veritable Milton Friedman, skeptical of the rationale for public regulation and subsidies, confident in the capacity of consumers to choose, and justified in thinking that competition in the spiritual marketplace would reduce the transactions costs that would otherwise arise if dissatisfied truth seekers had to struggle against official monopolies to find more efficacious paths to salvation. And to judge by the results, that market-oriented approach offers the best explanation for the remarkable success of the American experiment in religious pluralism. The distinctively Protestant character of nineteenth-century American civil society should be seen, that is, as something more than a natural or foreseeable by-product of the dissenting origins of the American population. It drew its strength as well from the pronounced spur to competition that the Virginia program encouraged. Privatization (in the form of free exercise) and deregulation (in the form of disestablishment) created what was, in effect, an active market for salvation, as sects sought their own niches as they competed for adherents while anxious adherents actively compared the spiritual wares offered.

Id. at 254–55.

690. *Id*. at 255 ("The greatest contribution the Sage of Monticello and the Father of the Constitution made to the creation of American civil society, then, was to articulate a principled basis for abjuring public regulation of religion, thereby helping to establish a completely privatized marketplace in which a variety of denominations, sects, and cults were forced to innovate and compete to gain adherents from a population whose religious convictions and allegiances were entirely voluntary.").

of the Revolution and in New England much later, in the first three decades of the nineteenth century.

IV. THE MODERN SUPREME COURT: AN EMPTY CLAUSE AND A RICH TRADITION

As reported by the First Congress in September of 1789 for ratification by the states, the Establishment Clause denied federal power in two respects. First, it acted as a restraint on the national government from interfering with the states and how each state's law dealt with the matter of religion.[691] The object was to protect the residual sovereignty of the states from the newly formed central government. It meant, for example, that Congress had no power to disturb the Congregational establishments in New England or, for that matter, to overturn state religious oath and test clauses, Sunday closing laws, and state restrictions on clergy holding public office. Scholars delight in pointing out this purpose,[692] for it is an embarrassment to the U.S. Supreme Court, which completely overlooked this federalism feature in deciding *Everson v. Board of Education*.[693] The no-establishment restraint was said by the *Everson* Court to be applicable to state and local governments under the Due Process Clause of the Fourteenth Amendment, a complete inversion of this first purpose of the Establishment Clause.[694]

The Establishment Clause had a second purpose, one that writers sometimes miss or at least prefer to minimize. The clause was to act as a restraint on the federal government when addressing matters

691. *See* Esbeck, *supra* note 2, at 15–17 (collecting authorities).

692. *See id.* at 16 n.54 (collecting authorities).

693. 330 U.S. 1 (1947) (upholding a state law permitting the reimbursement to parents the cost of transporting their children to K–12 schools, including those attending religious schools).

694. *See* HAMBURGER, *supra* note 20, at 436 n.112 (discussing why it is unlikely that the Fourteenth Amendment was meant to alter the meaning of the Establishment Clause); Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 17–29 (1998) (reviewing the congressional history of the post–Civil War debate over the text of the Fourteenth Amendment and certain religion questions and concluding that in 1867 and 1868 the Establishment Clause continued to be viewed as a power-limiting clause rather than as a rights clause).

otherwise clearly within the authority of the United States.[695] Accordingly, when Congress first provided for an army and navy, it might have asked, with an eye to the clause, what it could do (if anything) concerning facilities for soldiers and sailors to worship, or the provision of military chaplains.[696] Or, in creating the federal courts, Congress might have asked whether the rules of evidence could permit testimony only upon taking an oath that acknowledges a Supreme Being.

By the clause's terms, Congress is denied only the power to legislate "respecting an establishment of religion," thus leaving it free to more generally legislate "respecting religion." It thereby logically follows, for example, that Congress had the authority, without running afoul of the clause, to exempt religious pacifists from military service and thereby allow Quakers and others to exercise their religion.[697] At a minimum the Establishment Clause, in regard to this second purpose, meant that the new central government could not establish a national church or religion.[698] In the hands of the modern Court, however, the no-establishment restraint on governmental power has come to mean much more.

As noted above, the Supreme Court's decision in *Everson* applied, for the first time, the Establishment Clause to the actions of state and local governments. A clause never meant to "negative" the authority of the states now had to be filled with substantive content so as to police church-state relations at the crowded level of state and

695. RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 103 (1993); BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 114 (1987); Esbeck, *supra* note 2, at 15–22, 26–27 (citing additional authorities).

696. Consider additional questions Congress may have faced. In the conduct of the U.S. mails, might the operations of post offices be suspended on Sundays? In passing a copyright law, may original works on religious themes be protected?

697. The Court has upheld such an exemption in *Gillette v. United States*, 401 U.S. 437 (1971), holding that Congress may exempt a person from military service if he opposes all war but not those persons who object to participation in a particular war. The harder question involves not exemptions but religious participation in government education and welfare assistance programs. The Court has held that participation in generally available programs of direct assistance is not "an establishment" unless the funding results in governmental religious indoctrination, Mitchell v. Helms, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring in the judgment), or unless the aid is for a sectarian purpose such as religious worship, Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976).

698. *See* Esbeck, *supra* note 2, at 17–22.

local arrangements.[699] Given that huge task, the role of the Court in American church-state relations was bound to move to center stage. It did not take long. Just one year later, in *McCollum v. Board of Education*,[700] the Court, for the first time in its history, found a violation of the Establishment Clause.[701] *McCollum* disallowed the teaching of religion in public schools. Things really took off in the early 1960s,[702] when the Court struck down teacher-led prayer and devotional reading of the Bible in public schools and disallowed the state practice of requiring its officials to take a religious oath.[703]

For the Supreme Court to search for the original intent of the Establishment Clause as applied to actions by states seems a fool's errand. Once again, there is no original meaning of the clause when applied to the states because the clause was never meant to restrain the residual power of the states. If the future of the Establishment Clause was to be the Court's vehicle for holding in check state and local laws, then the Court faced the task of having to fill this nearly empty vessel with a content that would make sense when followed by state and local authorities. The Court understandably selected for that content the church-state settlement that had ultimately triumphed in the states during the period of disestablishment. This was a bold novation, but an apologist for the Court would say it was completely understandable given that the vessel had to be filled with content from somewhere. On the issue of church-state relations, the

699. The text says "crowded" because the overwhelming number of interactions between government and religion are with local officials or involve state laws. This disparity, as compared to relatively few interactions at the federal level, was even more pronounced during the nation's first 170 years than it is today.

700. 333 U.S. 203 (1948) (striking down the practice of offering elective classes in religion at a K–12 public school).

701. That was a span of 156 years and is some indication of how little importance the Establishment Clause had until its incorporation in *Everson*.

702. In passing it is worth observing that it is unlikely that the Establishment Clause, or the Supreme Court for that matter, would be of much account to contemporary church-state relations had the clause not been applied to state and local governments. In the 215 years of the Court's existence, only once has it found that the federal government has violated the Establishment Clause. *See* Tilton v. Richardson, 403 U.S. 672, 682–83 (1971) (upholding most every provision of a federal program providing aid to institutions of higher education to make capital improvements, including aid to institutions affiliated with a church, but striking down one provision of the program that allowed a religious college to utilize government-funded buildings for religious purposes after the passage of twenty years).

703. Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (devotional Bible reading and teacher-led prayer); Engel v. Vitale, 370 U.S. 421 (1962) (teacher-led prayer); Torcaso v. Watkins, 367 U.S. 488 (1961) (religious oath).

fifty-nine year span from 1774 to 1833 was the period of greatest testing, of remarkable juridical reordering, and of American uniqueness in breaking with its English-law past and, in material respects, the European tradition.

Both the majority and the dissenting opinions in *Everson* featured the Virginia experience of 1776 to 1786.[704] While Baptists and Presbyterians came down on the winning side in Virginia, and did so for biblical reasons (as they saw it), the same was more or less true in the other ten original states that once had an established church, as well as in Vermont and in Maine. As we have seen, this took much longer in New England. However, because of profound changes occurring at the time within American Protestantism, combined with the persistence of those like the Baptist John Leland, as well as late blooming disestablishmentarians like the Congregationalist Lyman Beecher, voluntaryism finally triumphed. They toppled the Standing Order and repudiated the belief that civic virtue, necessary to a republic, could safely be nurtured only by an established religion.

Baptists, Presbyterians, Methodists, pietists, and other religious itinerants and revivalists were the most numerous and the most vigorous supporters of disestablishment. That is, those Protestant denominations that were surging in numbers were also devoted enthusiasts for the separation of church and state. But the separation they embraced must be understood for what it was and what it was not. It was a separation of church and state driven by religious voluntaryism and, hence, highly protective of religiously informed conscience, but also a separation in which government was without authority as to subject matters within the province of the church. This was a separation of church and state that insisted that all religions were equal before the law, but also a separation where

704. 330 U.S. 1, 11–14 (Black, J., majority opinion), 33–42 (Rutledge, J., dissenting). The dissent attached to the opinion Madison's *Memorial and Remonstrance*. Similarly, four of the justices writing the following year in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948), relied not only on the Virginia experience, but also on the outworking of disestablishment in the public schools of Massachusetts and New York. *Id.* at 214–16 (Frankfurter, J., concurring in the judgment, joined by Jackson, Rutledge, and Burton, JJ.). In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court likewise relied on the experiences of several American colonies as they became states and moved through the disestablishment process. *Id.* at 430 (Madison's views), 431–32 (English law background), 433–34 (colonial Massachusetts, Connecticut, and Rhode Island background), 437–39 (Virginia experience), 492–95 (Frankfurter, J., concurring) (Virginia experience).

moral values based on religion were welcomed in the marketplace of ideas and in the formation of public policy and law.[705] Contrariwise, a separation of religion-based values from government and public affairs would have been received with wide disapprobation in the new nation. This is because civic virtue, now to be formed in the independent sectors of home, church, voluntary society, and school, was still deemed essential for the orderly exercise of liberty and acquisition of the self-discipline necessary to sustaining a republic.

As the post-*Everson* Supreme Court began to apply the Establishment Clause in accord with the ideas and accomplishments of the period of disestablishment, it quite naturally absorbed (perhaps unconsciously) the constructs of Western civilization and how the West framed the problem of civil governance and religion. Accordingly, whereas the relationship between individual believer and state was, quite naturally, worked out under the Free Exercise Clause, cases involving the relationship between organized religion and government were taken up under the Establishment Clause.[706] Moreover, as to the latter clause, the Court saw church and state as dual authorities (a view which dates all the way back to the fourth century) and pressed this dualism, however ill fitting, into the negative command to "make no law respecting an establishment of religion." Hence, the Establishment Clause was said to embody spheres of competence for church and state, and the clause was tasked with policing relations between them.

The final step in the Court's logic (and here the modern Court has been most explicit in its intra-church schism cases)[707] interprets the Establishment Clause as acknowledging religious societies as separate centers of authority, overlapping at times but sovereign within their own distinct sphere or province.[708] Fidelity to this last step is crucial because the drive by dissenting Protestants for disestablishment was to stop the corruption of institutional religion that follows from too close an embrace by Caesar. This restraint on

705. HAMBURGER, *supra* note 20, at 99–107.

706. *See* Esbeck, *supra* note 2, at 33–60.

707. *Id*. at 44–49.

708. *See* Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92–95 (1953) (identifying Court decisions as giving religious bodies some of the "prerogatives of sovereignty"); Stackhouse, *supra* note 32, at 111 (using "sovereignty" as descriptor). Rather than "sovereign," when organized religion acts within its jurisdiction, the modern term most often used is church autonomy.

governmental jurisdiction is reciprocal in its promise, expressed, for example, in *McCollum* as follows, "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[709] The American settlement hinged on each party to the alliance getting what it wanted. In other words, there would have been no disestablishment but for the recognition that religious bodies were autonomous as to those subject matters within their province.

If the modern Court is to faithfully draw upon the state-by-state struggle for disestablishment in the period from 1774 to 1833, this holds considerable promise for a more fixed, uniform, and widely understood application of the Establishment Clause. The arguments supportive of disestablishment, both by prominent religious figures as well as those more devoted to the guidance of reason, were: (1) that to be genuine in one's faith, religious belief and practice must be voluntary; (2) that establishment subordinates the church to the state, thus yielding jurisdiction over religious doctrine and governance for which the civil state is wholly without competence; (3) that establishment has a corrupting effect on the church and its clerics; (4) that as an institution that mediates between the state and the people, the churches presume to sit in judgment over, and thereby help limit, the state and its authoritarian pretensions; (5) that only a free and independent church will successfully exercise its prophetic voice and critique the state, a role important to limiting the state; (6) that a civil government that treats religions unequally will cause jealously and resentments within the body politic; (7) that religion, if vibrant and respected, can help temper selfish passions and oppressive tendencies and thus protect against harmful swings in popular sentiment to which republics are vulnerable; and (8) that religion, when perverted into a civil religion, collapses two very different and very powerful allegiances, risking a dangerous confounding of God and country, faith and nationalism.[710]

709. *McCollum*, 333 U.S. at 212.

710. In her contribution to this conference, Professor Hamilton argues that a republic's need for "ordered liberty" trumps any claim of church autonomy. *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV 1099. Certainly a republic needs "ordered liberty," and no one responsible argues to the contrary. But the American republic is also about limited government. Achieving her goal of the "public good" requires balance. That is, neither church nor state is absolute, and there are some

During this same period the arguments for retaining a religious establishment were: (1) that religion would decline if it depended entirely on voluntary support; (2) that a republic requires a moral, self-disciplined people, and only an established religion will reliably inculcate in the populous the needed civic virtues; and (3) that an established religion is useful as a point for rallying civic unity and, hence, cohesion as one people. Accordingly, in modern disputes that invoke the Establishment Clause, we should expect these later

matters concerning which neither can legitimately invade the space of the other. Professor Hamilton's argument assumes the very issue in debate rather than addressing it. No one is pressing for immunity for religious institutions from the rule of law to the detriment of the public good. Rather, the debate involves defining the contours and limits of the public good. Who gets to decide what is good for the public? When does a pluralistic secular society have to live without a singular rule of law in order to accommodate the multiple opinions of what the rule ought to be? Who gets to decide what it means to be a bishop, how he is to go about doing his job, how intensely must he supervise the priests in his charge? She obviously is outraged by the Catholic Church sex abuse cases (who isn't?), but the imposition of both criminal and tort liability in that worst of all cases does not explode the idea of church autonomy. Rather, it is just a clarification of the location of the church-state boundary such that the state may impose liability in the extreme cases of abuse.

The ancient name for what Professor Hamilton hypothesizes as "current legal doctrine" is Erastianism. That view is one of complete state supremacy over the church, a view that has been proven not to be good even for the state—for the state, too, is beset with abuse of power and tendencies to absolutism. She seems to assume that a church is answerable to the government as if such religious bodies were mere jural entities, creatures of the state. It is humbling to be reminded that churches and similar religious bodies predate the American republic and, one supposes, they will outlive it.

Ordered liberty is not only derived from the state's monopoly on lawful coercion; organized faith communities have, at times, served the invaluable role of keeping states and their ambitious officials in check. Esbeck, *supra* note 2, at 67–70. That is what brought us the *Magna Carta*, and why Thomas Becket and Thomas More are revered by free peoples to this day. Many readers of this paper will remember the heroic church in communist Poland, as well as the church in the Philippines under the Marcos' dictatorship. It should also be noted that a parallel source of the "ordered liberty" that Professor Hamilton elevates is the moral self-discipline taught by vibrant communities of faith. That, however, is not possible unless there are first healthy churches and other houses of worship, which means a recognition of a sphere of institutional freedom that we now call church autonomy.

Professor Hamilton's article is just one more intervention, albeit uncommonly statist, in the ancient debate over where best to locate the boundary between church and state. She claims that these two centers of authority had a series of legal clashes in England during the Middle Ages, that the state won, and so the state now rightly dominates. But the continued boundary disputes belie the claim that any one side "won" and now has the power to control the other when deemed to "be out of line." The struggle between church and state goes on, and so it shall, long after those, such as Professor Hamilton, have declared unconditional victory for their side. That the struggle between church and state continues, seemingly in perpetuity, is not cause for consternation. For within the interstices of this struggle, as well as its unresolved and unresolvable nature, is freedom for all who live our lives in a more or less orderly republic and yet thirst for the higher things of the spirit.

arguments to lose, or at least their weight to be much in decline. Consider, for example, the debate over displaying the Ten Commandments in state courthouses and the supporters' insistence that the Mosaic law—God's law—is foundational to modern positive law. According to these activists, it is not only permissible, but necessary, for the government (not just the culture of the people) to acknowledge this connection. We should expect these arguments to lose, and for the most part they do. Disestablishmentarians from two centuries back said that religion has no need for such props by the civil state; indeed, religion has a more positive bearing on the national culture without the props. If religious people want to hold up the Mosaic law as foundational to modern positive law, then they may do so in their homes, churches, and voluntary societies. Indeed, the Free Speech and Free Exercise Clauses guarantee them that right. But there is a material difference between a public building and a public forum. The freedom of the church "has never meant that a majority could use the machinery of the State to practice its beliefs."[711]

Another common thread in modern judicial opinions is the admonition to avoid using the instrumentalities of government, particularly the courts, to decide religious disputes.[712] This is done not to protect the state courts from religion, but to protect organized religion from state courts. The rule easily could have been copied right out of a pamphlet by the Baptist Isaac Backus or from an essay by the "new light" Presbyterian Elisha Williams. The most familiar application of this rule today is the "ministerial exception" that the federal circuits overlay on employment nondiscrimination laws when the employer is a religious organization.[713] The constitutionally based exception is acknowledged, not to protect individual free exercise but because of the government's lack of power to regulate religious societies in areas within their exclusive

711. Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

712. *See* Esbeck, *supra* note 2, at 56–57 (collecting authorities).

713. *See, e.g.*, Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

province,[714] a jurisdictional restraint that dates to America's disestablishment.

Indeed, the entire array of disestablishmentarian ideas appears in the modern cases, albeit more secular sounding to suit modern sensibilities. Consider, for example, Justice Stevens' majority opinion in *Wallace v. Jaffree*,[715] acknowledging that voluntaryism entails a judgment about which faiths are worthy of respect:

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .[716]

Similarly, in *Engel v. Vitale*[717] the Court observed that once a church is more responsive to the aims of the state than its own calling, the religion loses the respect of a free-minded people:

> [The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[718]

If religious Americans, especially religious conservatives, have not always been faithful to the church-state settlement that came out of the period of state-by-state disestablishment, American liberals have also lacked fidelity. The ready example of liberalism taking an illiberal turn and attempting to drive the religious voice out of the public

714. *See, e.g.*, *Bryce*, 289 F.3d at 656 ("[C]ourts reason that, unlike *Smith*, [494 U.S. 872 (1990)] the ministerial exception addresses the rights of the church, not the rights of individuals."); *Catholic Univ. of Am.*, 83 F.3d at 462.

715. 472 U.S. 38 (1985) (overturning a state law requiring a moment of silence in public schools for student prayer or meditation).

716. *Id.* at 52–53.

717. 370 U.S. 421 (1962) (striking down teacher-led prayer in public schools).

718. *Id.* at 431 (footnote omitted).

square concerns equal access to public fora for speech of religious content or viewpoint. The machinery of civil government should no more be used to suppress the religious voice than to promote it. Yet public officials in high numbers still persist in arguing that the Establishment Clause requires that religious speech (especially worship and proselytizing) be treated differently,[719] and that religious groups be discriminated against in public fora in municipal buildings[720] and public schools.[721] The sophistry of local officials is that there is a "conflict" or "tension" between the Establishment Clause, on the one hand, and the Free Speech and Free Exercise Clauses, on the other hand. Compliance with the no-establishment principle, they argue, provides the "compelling governmental interest" that legitimates the government's discrimination against religious speech.[722]

To the Supreme Court's credit, the religious claimants win all these equal access cases.[723] The High Court, however, has had to keep taking up these cases because of resistance in some of the

719. Distinctions between religious speech, on the one hand, and religious worship, on the other hand, have been known to be unconstitutional since *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 nn.9, 11 (1981).

720. *See, e.g.*, DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (holding that the village could not exclude National Day of Prayer meeting from public forum limited to civic purposes).

721. *See, e.g.*, Child Evangelism Fellowship v. Stafford Township Sch. Dist., No. 03-1101, 2004 U.S. App. LEXIS 21473 (3d Cir. Oct. 15, 2004) (holding that public school teachers did have to distribute to students information on an after-school religious club because teachers handed out similar information on after-school secular clubs and that the Establishment Clause did not excuse such a refusal); Child Evangelism Fellowship v. Montgomery County Pub. Schs., 373 F.3d 589 (4th Cir. 2004) (same); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004) (same).

722. Those arguing a "collision" between the clauses distort the fundamental nature of the Establishment Clause, which is not an individual right but a structural restraint on the government's power. *See supra* text accompanying notes 6–10.

723. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that a school could not deny an elementary school Bible club the right to meet on the same terms as other clubs); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that a state university could not deny student religious newspaper the right to funding on the same terms as other student secular newspapers); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school could not deny a church the right to show films during the evening in school building on the same terms as other community organizations); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding Equal Access Act in face of Establishment Clause challenge); *Widmar*, 454 U.S. 263 (holding that a state university could not deny a student religious organization access to facilities for meetings on the same basis as other secular student organizations).

federal circuits to following the Court's case law.[724] The Court needs to say, once and for all, that it is not possible for the Establishment Clause to be in "conflict" with liberty,[725] and thus the clause can never be read to supply the "compelling interest" needed to override free speech or free exercise rights. Moreover, one has to wonder: did religious freedom prevail in these equal access cases only because the religious claimants argued foremost the Free Speech Clause? Certainly arguing free speech helped the religious claimants appear less like special pleaders to liberal eyes. And liberals, most of them anyway, will defend speech with which they do not agree, even speech that is religious proselytizing. However, the basis for equal access in these cases is more foundational: the institutional separation of church and state was never intended to silence the church. Rather, separation was to limit the power of the state and thereby afford more breathing room for the church to be the church.[726]

Second, some insist that a religious exemption in regulatory and tax legislation is unconstitutional.[727] They would have religious groups be treated like any other voluntary association. But the very reason for causing religious organizations to be jurisdictionally "separated" from government is to reduce conflicts between the two and thereby to protect church autonomy. The word "exemption" is merely the legislative rubric for accomplishing that deeper purpose. Religious exemptions from regulatory or tax burdens do not violate the Establishment Clause—they reinforce the desired distance between church and state.[728] Some voices argue to the contrary,

724. See, for example, the Supreme Court's scolding of a divided panel of the Second Circuit in *Good News Club*, 533 U.S. at 109 n.3 ("We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn.").

725. *See supra* notes 8–10.

726. *See supra* text accompanying note 705.

727. *See, e.g.*, Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 557 (1998) ("I emphasize that I am not urging the abandonment of exemptions on the basis of a normative argument, but rather for the pragmatic reason that they can no longer be justified with the theoretical resources available in late 20th century legal culture.").

728. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding an exemption in Title VII of 1964 Civil Rights Act for religious organizations staffing on a religious basis); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding a property tax exemption for religious organizations); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a release time program for students to attend religious classes off public school grounds);

decrying cases such as *Corporation of the Presiding Bishop v. Amos*[729] and *Walz v. Tax Commission*,[730] and aggressively overreading the plurality opinion in *Texas Monthly, Inc. v. Bullock*.[731] However, a

Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding, inter alia, military service exemptions for clergy and theology students); *see* Gillette v. United States, 401 U.S. 437, 450–60 (1971) (holding that a religious exemption from military draft for those who oppose all war does not violate Establishment Clause).

729. 483 U.S. 327 (1987) (upholding as not violative of Establishment Clause a statute exempting religious organizations from civil rights law that prohibited employment discrimination on the basis of religion).

730. 397 U.S. 664 (1970) (upholding as not violative of Establishment Clause a statute exempting religious organizations from property taxes).

731. 489 U.S. 1 (1989) (plurality opinion). In *Texas Monthly*, a three-justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating religious faith as violative of the "secular purpose" requirement of the Establishment Clause. *Id.* at 17. Justice White wrote separately because he believed that the law was a content-based discrimination violative of the Free Press Clause. *Id.* at 26 (White, J., concurring). Justice Blackmun also wrote separately, joined by Justice O'Connor, holding narrowly that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause." *Id.* at 28 (Blackmun, J., concurring).

Portions of the three-justice plurality suggest the unconstitutionality of religious exemptions from regulatory and tax burdens unless the scope of the exemption is broadened to include a number of nonreligious groups that provide similar charitable or beneficent services. *See id.* at 11–12. I do not think this states the law. First, the rationale of a three-justice plurality is not controlling. Plurality opinions of the Supreme Court are not binding on lower federal and state courts except on the narrow question decided. Indeed, just one year later a majority of the Court in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), invited the unsuccessful litigants to seek religion-specific exemptions from general regulatory laws by going to the legislature. It would be disingenuous to commend legislative exemptions as an avenue of relief for religious claimants if such exemptions, once secured from a legislature, were unconstitutional.

Second, the three-justice plurality went out of its way to say that the opinion was not contrary to two important cases generally upholding religious exemptions: *Amos* and *Zorach*. *Texas Monthly*, 489 U.S. at 18 n.8. The plurality even opined that it would be constitutional if the U.S. Air Force adopted a religious exemption from the military's rule on the wearing of official head gear, albeit, such a rule is not required by the Free Exercise Clause. *Id.* at n.8.

Third, at one point the three-justice plurality suggested that the problem with the tax exemption before it was that it was too narrow. The sales tax exemption favored sacred writings and "writings promulgating the teaching of the faith," as opposed to all religious writings. *Id.* at 5, 16 n.6. A religious exemption can be unconstitutionally narrow by favoring some religious beliefs or practices over others. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 702–05 (1994) (striking down a law, inter alia, because it sought to relieve a burden from a single religious sect); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (see the Court's explanation of *Estate of Thornton* in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 145 n.11 (1987)). If confined to this principle of law, the result in *Texas Monthly* is consistent with the Court's case law elsewhere.

Fourth, at times the three-justice plurality characterized the sales tax as a benefit or subsidy for the purchasers of these materials. *Texas Monthly*, 489 U.S. at 14–15. This is wrong; it is an exemption from a tax burden. But if the tax law before the Court could have been

government does not establish a religion by leaving it alone. The fact that religion is left undisturbed when other organizations are burdened by new regulations or taxes is a mere consequence of the desired separation of these two authorities, church and state.

Third, illiberal liberalism is urging an erosion of the public-private distinction embodied in the "state action" doctrine.[732] The aim is to impose on religious organizations receiving government assistance the duty to be secular in the same sense that government must be secular. They argue, for example, that a government-funded, faith-based provider of social services should be forced to secularize its operations. This is not liberty of association. This is not classical liberalism. This puts religious organizations to a cruel choice: either forfeit their right to compete on an equal basis for public funding to do social service work or recant the religious beliefs that form their essential character.[733] No other group, regardless of its ideology, is asked to self-destruct in this way.

Under current law, religious organizations are not "state actors" subject to constitutional duties merely because they successfully compete for government grants as part of a neutral program of education or social-service funding.[734] To bulldoze through the public-private distinction and treat faith-based social-service organizations receiving government assistance, as well as K–12 religious schools enrolling publicly aided students, as having the same constitutional duties as the government would crush the

properly characterized as a benefit, then the Court would be correct to strike it down as a financial benefit that favors religion over nonreligion.

732. *See, e.g.*, MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002) (advancing author's own conception of democratic values as constitutional norms, and then suggesting this designer democracy trumps historic First and Fourteenth Amendment rights).

733. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 23–27 (1997) (explaining how church autonomy is served by neutrality in government funding of social service providers, including religious providers); Carl H. Esbeck, *Statement Before the United States House of Representatives Concerning Charitable Choice and the Community Solutions Act*, *reprinted in* 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 572–76 (2002) (defending the basis for protecting the religious staffing rights of faith-based social service providers).

734. *See* Blum v. Yaretsky, 457 U.S. 991, 1002–12 (1982) (holding that pervasive regulation and receipt of government funding at private nursing homes do not make nursing home decisions state action); Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982) (holding that private school heavily funded by state is not state actor); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (stating that mere acquiescence by the law in private actions of warehouse does not convert the acts by the warehouse into those of the state).

institution's religious autonomy. That is not separation of church and state. That is not the church-state settlement of the early American republic. This debate is most prominent in relation to religious staffing rights of social service providers and President Bush's faith-based initiative.

What is needed by liberals and religious conservatives alike is fidelity to the American church-state settlement. It is in the long-term interest of both. It is a win-win situation. One of the aims of this modest paper is to help them to understand that this is so.

V. CONCLUSION

We have seen that the problem of religious freedom is usefully subdivided by considering two relationships: the relationship between nation-state and individual adherents and that between nation-state and organized religion. In the West, since the fourth century, the second relationship presumes a dual-authority pattern, one of coexisting governmental and religious institutions, the former with authority over the civil and the latter having its province over the spiritual. For seventeen centuries now these two centers of authority have at times competed and at times cooperated. While the exact boundaries between the two remain conflicted, it is understood that although the respective jurisdictions overlap at many points, nevertheless there are subject matters over which the state has sovereign power and subject matters over which the church has exclusive authority. The First Amendment, with its doctrine of church autonomy, is a recognition of the latter, namely, that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.

It is not surprising that American jurisprudence, very much in the stream of Western civilization, came to tacitly absorb this dual-authority pattern. The American colonialists brought with them a variety of European models of church-state relations, almost all of which entailed a state church. Over time, however, dissenters remonstrated for greater religious freedom, first for free exercise of conscience and then for disestablishment. The foregoing occurred as society was moving away from authoritarian and toward republican government. Meanwhile religious monopoly in America was convulsed as interest in religion expanded during the First Great Awakening (1720s–50s). These events worked together to make

religious establishments vulnerable. In the Middle Colonies the establishments faded before the War of Independence. In the Southern states the Anglican establishments were set aside during the War or within the decade thereafter. Another three decades passed before the Congregational establishment came down in New England. Thus the American disestablishment occurred over a fifty- to sixty-year period, from 1774 to the early 1830s. It introduced a church-state settlement into the new republic that departed sharply from anything known in Europe.

The American disestablishment was entirely a state-law affair. Thus disestablishment was not a consequence of the War of Independence. Moreover, disestablishment neither culminated with the adoption of the Establishment Clause in the First Amendment of 1791, nor was disestablishment hastened along by it. That is, contrary to widely held belief, the Establishment Clause did no serious work whatsoever in the furtherance of disestablishment. The reason is simple enough: in the early republic it was known and appreciated that the Establishment Clause acted to bar the federal government from interfering with how the states dealt with the prickly matter of religion.

At the state level, where the work of disestablishment did take place, the vast number of those pushing for it were not doing so out of rationalism or secularism. Rather, they were religious people who sought disestablishment for (as they saw it) biblical reasons. They were allied in this effort by certain well-placed statesmen, most notably James Madison. Together, they decried state establishments as having the effect of corrupting religion, the clergy, and the church. Second, they saw state involvement in religious creed and forms of observance as unnecessarily dividing the body politic. They believed that such inherently religious questions were never properly within the state's role. By circumscribing the state's power and thereby deregulating religion, the alliance sought a more limited state, one without jurisdiction over church doctrine, forms of observance, selection of clergy, and internal governance. The settlement presumed a unifying compact, of course, but at a more modest level of consensus, namely agreement on the moral principles by which the civil polity is to make political decisions.

Those against religious establishment were for religious voluntaryism. The disestablishment of the Anglican church in the South and the disestablishment of Congregationalism in New

England came in the midst of the Second Great Awakening (1783–1830s). In a sense this second wave of revival finished the work started by the first, namely, changing how Americans thought about religion. Religion became more personal and emotional, less authoritarian, more decentralized, and more focused on guidance in daily living and less on abstract doctrine. A top-down rule by a professional class of ecclesiastics was at odds with the growing American ethos of liberty and individualism and a leveling of social classes.

By 1833, religious voluntaryism had triumphed over the last remaining establishment in Massachusetts. The opposition did not go away, of course. It continued to assert whenever possible the use of government to endorse the dominant Protestant faith. This was more successful in communities of fairly homogeneous Protestantism than it was in major cities, which were busy absorbing immigrants of diverse faiths. So it must be conceded that the practice of voluntaryism occasionally lagged behind the principle. Nevertheless, for over a century the matter of keeping church and state in their proper spheres was the near exclusive province of the states.

In the 1940s and 1950s the United States Supreme Court was at the vanguard of the rights revolution. Clause by clause the provisions of the federal Bill of Rights were "selectively incorporated" through the Fourteenth Amendment and made binding on the states. When in 1947 the Establishment Clause was incorporated and made applicable to state and local governments in *Everson*, the Supreme Court faced something of a paradox. Unlike other clauses in the Bill of Rights that have been incorporated, the Establishment Clause was not about individual rights but about structure.[735] That meant the clause restrained the national government from interfering with how the states dealt with the sensitive matter of religion. If Connecticut, for example, wanted a state church, Congress had no authority to stop it. Incorporating the Establishment Clause destroyed the clause's work as a restraint on federal power over states. That left a clause emptied of much of its original purpose, a vessel needing to be filled with new meaning about government-church relations at the state and local level. For that meaning the Supreme Court drew upon the period of America's state-by-state disestablishment and the early republic's church-state settlement.

735. *See, e.g.*, authorities cited in notes 3 and 6, *supra*.

This was a novation, simultaneously aggressive and bold. It was aggressive because the Court expanded federal judicial power to the work of policing state and local government when and where it touched religion—which happens often and nearly everywhere. The new and expanded task of the federal judiciary was to restrain the exercise of civil power in matters inherently religious, whether that power was being utilized to help or hinder religion. Inherently religious questions and disputes were reserved to the sphere of organized religion, a body of law now called church autonomy. While bold, it was a legal development Americans have, since *Everson*, lived with now for almost sixty years. We have simply gotten used to it. To be sure there are voices on the right that still call for placing the springs of government behind their faith. And there are voices on the left seeking to work the levers of government to deny equal access to religious expression in public fora and to oppressively regulate (and thus secularize) religious schools and social-service ministries. We should spurn these efforts and continue to remind all who will listen of the promise of voluntaryism: a free church and a limited state has proven best for religion and best for civil government.